Electrical South, Inc. and Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC. Cases 11–CA–16048, 11–CA–16120–1, 11–CA–16176, 11–CA–16388, 11–CA–16448, 11–CA–16625, 11–CA–16700, and 11–CA–16863

December 11, 1998

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On March 17, 1997, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed a brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The judge found, and we agree, that on June 19, 1995,[3] the parties had reached impasse in their negotiations on the subject of health insurance, and that the Respondent was thus privileged to implement its health insurance proposal on July 1. We agree that this is so, notwithstanding the Charging Party's pending, unanswered June 21 information request regarding health insurance prescription costs and premiums. As the judge found, the Charging Party made that information request after June 19, when the parties were at impasse. In our view, the information request and the nonresponse thereto did not alter the fact that the parties were at impasse. We further agree with the judge that information sought by the Charging Party in its June 21 information request was relevant information which the Respondent was obligated to provide, and that its failure to do so violated the Act.

We do not agree, however, with the judge's finding that the Respondent had no obligation to address the issue of health insurance when the Charging Party raised the issue during a negotiation meeting on July 21. Accordingly, we reverse the judge and find that the Respondent's refusal to discuss insurance on July 21 violated Section 8(a)(5) of the Act.

The relevant facts are these. The parties agreed to address noneconomic contract language in their collective-bargaining negotiations before turning to economic issues. They had been bargaining over such language for several months without reaching agreement when, in late March 1995, the Respondent notified the Charging Party that it faced an imminent lapse in its health insurance coverage and a 70-percent increase in premiums in order to continue the existing coverage. The parties agreed to bargain over insurance separately from the overall contract. The Charging Party's chief negotiator, Harris Raynor, testified that

> . . . the current insurance package was going to expire on April 30th, and . . . we had to have something new in place by May the 1st or employees could conceivably be without coverage . . . we were bargaining immediately for something that we could implement right away.

There is no evidence that the parties intended to foreclose all further discussion of health insurance once the danger of an insurance lapse had been avoided and they

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent also has excepted to the judge's decision, asserting that it evidences bias and prejudice. Upon our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis and discussion of the evidence.

Contrary to the Respondent's contention, we find that the judge did consider the possibility of witness bias in assessing the credibility of General Counsel's witnesses Peter Adams, Glen Flaherty, Allen Murray, Donald Tucker, and Charles Trotter. The judge permitted the Respondent to adduce evidence that these witnesses were, or had been involved in, litigation against the Respondent and that some had established businesses which, according to the Respondent, were its competitors. Further, the Respondent addressed this issue in its posthearing brief to the judge. Having considered the evidence and the Respondent's post-hearing brief, the judge nonetheless credited the testimony of these witnesses regarding the circumstances surrounding the Respondent's closure of the CPT department.

In adopting the judge's finding that Shift Supervisor Williamson violated Sec. 8(a)(1) by his May 12, 1994 remarks to employees attributing changes in the Respondent's break and telephone usage policies to employees' union organizing efforts, we do not rely on fn. 9 of the judge's decision.

In adopting the judge's determination that the Respondent violated Sec. 8(a)(5) by unilaterally changing its past practice concerning employee merit pay increases, we rely on the judge's finding that the Respondent exercised its discretion differently in 1995 and 1996 from prior years and established a cap on the amount of the increase. We find no merit in the Respondent's exception to the judge's finding based on an alleged failure of the Charging Party to request bargaining over the merit pay raises. As the judge correctly found, although the Respondent's policy of granting merit increases ante dated the Union's certification, the amount of the merit increases was discretionary. Thus, it was the Respondent's obligation to give the Union notice and an opportunity to bargain regarding changes in the merit increase program. It did not do so. In any case, it is without merit for the Respondent to suggest that the Charging Party should have requested bargaining over the merit increases at a time when the parties had agreed to defer bargaining on economic issues (except health insurance, discussed infra) until contract language issues had been settled.

[2] We grant the parties' August 19, 1998 joint motion to sever portions of the instant case relating to the discharge of Lee Sprecker, and we shall remand those portions of the case to the Regional Director for purposes of effectuating a settlement.

[3] All dates are 1995 unless otherwise indicated.

had reached agreement or impasse on "something [they] could implement right away."

The first bargaining session regarding insurance occurred on April 10. In late April the Respondent notified the Charging Party that its insurance coverage had been extended for an "indefinite but not infinite" period. The Charging Party did not advise the Respondent that, given the continuation of insurance coverage, it was no longer willing to negotiate insurance separately. The parties continued to bargain separately about insurance, concurrent with their ongoing negotiation of contract language issues.

By June 19, the Respondent's position on its insurance proposal had hardened,[4] and the unit employees had rejected the Respondent's proposal. The Respondent asked the Charging Party if they were at impasse on insurance. In response, the Charging Party proposed, for the first time since the parties had agreed to bargain over insurance separately, to deal with insurance as part of the whole economic package. The Respondent protested the Charging Party's attempt to "change the rules." Thereafter, the Respondent notified the Charging Party that the insurance negotiations were at impasse and that it intended to implement its insurance proposal on July 1.

On June 21, the Charging Party requested additional information regarding the Respondent's insurance proposal, including information about prescription costs and premiums. The Respondent had not responded to that information request when, on July 1, it implemented its health insurance proposal. The Charging Party attempted to discuss health insurance and its outstanding request for information with the Respondent when they next met for bargaining on July 21. The Respondent advised that the issue was settled and that it had no obligation to bargain further regarding insurance.

On these facts, the judge found, and we agree, that the parties continued to have an agreement to bargain over health insurance separately, even after receiving notice that the insurance coverage would not lapse on April 30. Thus, we have found, in agreement with the judge, that the parties' agreement to bargain separately remained in force, that the Respondent was justified in assuming that the parties were bargaining over insurance separately after the late-April extension of the insurance deadline, and that the Charging Party sought to "change the rules" on June 19 by proposing to bargain over insurance as part of the whole economic package. We further agree with the judge that the parties had reached impasse in their health-insurance negotiations on June 19, 1995, and that the Respondent did not violate the Act by implementing its insurance proposal on July 1. We also have adopted the judge's finding that the Charging Party's June 21 request for information about prescription costs and premiums was relevant with regard to the Charging Party's formulation of future bargaining proposals, and that the Respondent violated Section 8(a)(5) of the Act by failing to provide the information.[5] However, inasmuch as this information concerned *future* bargaining proposals, the failure to supply this information did not taint or alter the impasse of June 19, which impasse related to a stop-gap measure.

In light of the above findings, we cannot agree with the judge that, because impasse had been reached and the Respondent's insurance proposal had been implemented as of July 21, "there was no obligation on the part of Respondent to address an economic item at that time." The impasse was reached with respect to a stop-gap measure to provide for coverage until a more permanent policy could be agreed upon. The Respondent was under a continuing obligation to bargain for a more permanent arrangement. Accordingly, the refusal to bargain, on July 21, for a more permanent arrangement violated Section 8(a)(5).

Further, even assuming arguendo that the impasse of June 19 pertained to a stop-gap measure *and* a more permanent arrangement, this would not privilege the refusal to bargain on July 21 for a more permanent arrangement. In this regard, we note that the Respondent unlawfully refused to supply information on June 21. Such information was relevant to bargaining for a more permanent arrangement. Thus, to the extent that the impasse of June 19 pertained to a more permanent arrangement, that impasse was broken on June 21, and could not privilege the refusal to bargain on July 21.

Accordingly, we reverse the judge's decision and find that the Respondent violated Section 8(a)(5) of the Act on July 21 when it refused to discuss health insurance with the Charging Party.[6]

[4] As the judge has noted, there is no allegation of bad-faith bargaining.

[5] The Respondent has not excepted to the judge's finding that its failure to provide requested information violated the Act.

[6] To remedy the Respondent's unlawful refusal to discuss health insurance, we shall modify the judge's recommended Order by requiring the Respondent to cease and desist from its unlawful conduct. The judge's recommended Order, which we have adopted, as modified, already requires the Respondent to bargain with the Charging Party concerning unit employees' terms and conditions of employment. In view of our decision, that order to bargain encompasses the subject of health insurance.

Member Brame would find that the Respondent's refusal to discuss health insurance on July 21 was lawful because the parties were at lawful impasse as of June 19 and there is no evidence of any intervening event "that would be likely to affect the existing impasse or the climate of bargaining." *Civic Motor Inns*, 300 NLRB 774, 775 (1990). Member Brame disagrees with his colleagues' apparent finding that the Union's June 21 information request, and the Respondent's unlawful refusal to provide the information, is sufficient to break the impasse, as this occurrence fails "to give a sufficient indication of changed circumstances to suggest that future bargaining might be fruitful." Id. at 776.

Rather, Member Brame agrees with his colleagues' finding that, "inasmuch as this information concerned *future* bargaining proposals, the failure to supply this information did not taint or alter the impasse of June 19.

AMENDED CONCLUSIONS OF LAW

Add the following to Conclusion of Law 3, line 6, between "merit increases" and "and failing": "refusing to address health insurance during collective-bargaining negotiations before reaching impasse or agreement on an overall contract."

ORDER

The National Labor Relations Board orders that the Respondent, Electrical South, Inc., Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Advising employees that, because of their union activities, company policies will be more strictly enforced and discussion about the Union will be prohibited.

(b) Advising employees that selection of the Union as their collective-bargaining representative was futile.

(c) Coercively interrogating employees concerning their union sympathies, activities, and desires and creating the impression that their union activities were under surveillance.

(d) Advising employees that the wearing of union insignia is inappropriate.

(e) Threatening unspecified reprisals and plant and department closure because of employees' union activities.

(f) Eliminating departments, laying off employees, denying them bonuses, or issuing written and verbal warnings because they engage in union activities or other protected concerted activities.

(g) Unilaterally changing company policies relating to breaks, discipline for violation of its tobacco policy, parking, and bidding on job vacancies.

(h) Unilaterally creating an assistant supervisory position that includes the continued performance of bargaining unit work.

(i) Dealing directly with employees regarding the scheduling and length of breaks.

(j) Unilaterally establishing employee wages by granting merit increases without notice to, or bargaining with, the Union.

(k) Failing and refusing to provide relevant information relating to the cost of drug coverage.

(l) Refusing to address health insurance during collective bargaining negotiations before reaching impasse or agreement on an overall contract.

(m) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reestablish the CPT department at its Greensboro, North Carolina, facility in a manner consistent with its operation prior to January 23, 1995.

(b) Within 14 days from the date of this Order, offer Peter Adams, Glen Flaherty, Alan Haynes, Russ Jenson, Stephanie Lewellen, Dwayne Linden, Allen Murray, and Jeffery Pippen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make the employees named above in subparagraph (b) whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Peter Adams, Glen Flaherty, Alan Haynes, Russ Jenson, Stephanie Lewellen, Dwayne Linden, Allen Murray, and Jefferey Pippen, the unlawful written warnings to David Albertson and Charles Trotter, and the unlawful verbal warning to Doug Gwaltney, and within 3 days thereafter, notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(e) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees in the ATE engineering department and the component test engineering department including calibration engineer, and all full-time and regular part-time production and maintenance employees, including schematic and parts department employees, engineering aides and traffic (shipping and receiving) department employees employed by the Respondent at its Greensboro, North Carolina, facility; excluding all other employees, including office clerical employees, customer service employees, CIS employees, REA employees, QAD employees, outsource/exchange employees, piece work department employees, marketing and accounting employees, guards and supervisors as defined in the Act.

(f) Upon the request of the Union, rescind any or all changes relating to breaks, discipline for violation of its tobacco policy, parking, bidding on job vacancies, and creation of an assistant supervisory position that includes the continued performance of bargaining unit work.

(g) Make whole the bargaining unit employees for any losses they may have suffered by Respondent's unilateral implementation of annual merit raises in the manner set forth in the remedy section of this decision and, upon the request of the Union, bargain concerning employee wages as affected by the granting of merit increases.

(h) Provide the information requested by the Union on June 21, 1994.

(i) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all

other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Greensboro, North Carolina, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 26, 1994.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the joint motion to sever the portion of the Case 11–CA–16863 pertaining to the discharge of Lee Sprecker is granted and that portion of the case is remanded to the Regional Director for Region 11 for the purpose of effectuating a settlement.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT advise you that, because of your union activities, company policies will be more strictly enforced and discussion about the Union will be prohibited, nor will we advise you that selection of the Union as your collective-bargaining representative was futile.

WE WILL NOT coercively question you about your union support or activities, nor will we create the impression that your union activities are under surveillance.

WE WILL NOT advise you that the wearing of union insignia is inappropriate.

WE WILL NOT threaten you with unspecified reprisals and plant and department closure because of your union activities.

WE WILL NOT eliminate departments, lay you off, deny you bonuses, or issue written and verbal warnings because you engage in union activities or other protected concerted activities.

WE WILL NOT refuse to bargain with the Union regarding your terms and conditions of employment.

WE WILL NOT refuse to address health insurance during collective-bargaining negotiations before reaching impasse or agreement on an overall contract.

WE WILL NOT unilaterally change your wages, hours, or working conditions, and WE WILL, upon the request of the Union, rescind any or all changes relating to breaks, discipline for violation of our tobacco policy, parking, bidding on job vacancies, and the creation of an assistant supervisory position that includes the continued performance of bargaining unit work.

WE WILL NOT unilaterally establish employee wages by granting merit increases without notice to, or bargaining with the Union, and WE WILL make whole the bargaining unit employees for any losses they may have suffered by our unilateral implementation of annual merit raises, and WE WILL bargain, on request, concerning employee wages as affected by the granting of merit increases.

WE WILL NOT deal directly with you regarding the scheduling and length of breaks.

WE WILL NOT fail to provide the Union with relevant information that it has requested, and WE WILL provide the information requested by the Union on June 21, 1994.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Peter Adams, Glen Flaherty, Alan Haynes, Russ Jenson, Stephanie Lewellen, Dwayne Linden, Allen Murray, and Jefferey Pippen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Peter Adams, Glen Flaherty, Alan Haynes, Russ Jenson, Stephanie Lewellen, Dwayne Lin-

[7] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

den, Allen Murray, and Jefferey Pippen whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the layoffs of Peter Adams, Glen Flaherty, Alan Haynes, Russ Jenson, Stephanie Lewellen, Dwayne Linden, Allen Murray, and Jefferey Pippen and the written warnings to David Albertson and Charles Trotter, and the verbal warning to Doug Gwaltney, and WE WILL, within 3 days thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL reestablish the CPT department at our Greensboro, North Carolina, facility in a manner consistent with its operation prior to January 23, 1995.

WE WILL, on request, bargain with Amalgamated Clothing and Textile Workers Union, AFL–CIO, CLC, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees in the ATE engineering department and the component test engineering department including calibration engineer, and all full-time and regular part-time production and maintenance employees, including schematic and parts department employees, engineering aides and traffic (shipping and receiving) department employees employed by the Respondent at its Greensboro, North Carolina, facility; excluding all other employees, including office clerical employees, customer service employees, CIS employees, REA employees, QAD employees, outsource/exchange employees, piece work department employees, marketing and accounting employees, guards and supervisors as defined in the Act.

ELECTRICAL SOUTH, INC.

Jasper C. Brown, Jr., Esq., for the General Counsel.
Allan L. Shackelford and *John G. McDonald, Esqs.,* for the Respondent.
David M. Prouty, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Winston-Salem, North Carolina, on September 30, October 1, 2, and 3, and November 4 and 5, 1996,[1] upon a consolidated complaint which issued on April 12, 1996.[2] The complaint alleges numerous violations of Section 8(a)(1), various violations of Section 8(a)(3), including a discharge and elimination of a department, and multiple unilateral changes and a refusal to provide information in violation of Section 8(a)(5). Respondent's timely answer denies all violations of the Act.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware limited partnership, is engaged in industrial electronics repair at its facility in Greensboro, North Carolina, where it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of North Carolina. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.[4]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Electrical South is engaged in the business of repairing industrial computer boards and various electronic controls. The majority of its work is performed by technicians who use schematics, usually provided by the manufacturer of the PC board, to isolate the problem and repair it. From 1992 until January 1995, Electrical South also employed a number of engineers in its component test (CPT) department. These engineers repaired one-of-a-kind PC boards for which schematics were not available. In early 1994, Electrical South was a corporation owned by President Greg Smith. Smith sold the Company in late 1994 to a limited partnership. He continued as chief executive officer (CEO) of the Company.

Electrical South was a nonunion company. Its employee handbook stated that "it is certainly our desire that it always remain that way.'' In further discussion of the Company's nonunion status, the handbook requested that, if an employee were solicited to sign a union card, "we are asking you now to refuse to sign it.'' Notwithstanding this request, employees sought representation by the Union in early 1994. Respondent opposed the Union during the campaign. A *Globe*[5] election, in which the CPT engineers voted to be included in the unit with production

[1] All dates are 1994 unless otherwise indicated.

[2] The charge in Case 11–CA–16048 was filed on May 26. The charge in Case 11–CA–16120–1 was filed on July 12, was amended on August 26, and was again amended on March 3, 1995. The charge in Case 11–CA–16176 was filed on August 19. The charge in Case 11–CA–16388 was filed on January 25, 1995. The charge in Case 11–CA–16448 was filed on March 3, 1995, was amended on March 24, 1995, and was again amended on April 26, 1995. The charge in Case 11–CA–16625 was filed on July 17, 1995. The charge in Case 11–CA–16700 was filed on September 18, 1995. The charge in Case 11–CA–16863 was filed on February 1, 1996.

[3] The answer pleads that Sec. 10(b) bars several 8(a)(1) and (5) allegations. Respondent did not argue this defense at hearing or in its brief. Amendments to a timely charge are deemed to relate back to the date of filing of the original charge, so long as the matters alleged are similar and arise out of the "same course of conduct.'' *Pankratz Forest Industries*, 269 NLRB 33 (1984); see also *Helnick Corp*., 301 NLRB 128 (1991). The amended charge in Case 11–CA–16120–1, initially filed on July 12, includes the disputed allegations. They arise out of the same course of conduct and are similar to the violations initially alleged.

[4] Subsequent to the filing of the charges herein, the Union merged with the International Ladies' Garment Workers' Union to form the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE).

[5] *Globe Machine & Stamping Co.,* 3 NLRB 294 (1937).

and maintenance employees and which the Union won, was held on May 6. Respondent filed objections to the election. Prior to the Union's certification, Respondent made various changes in policies without bargaining with the Union. The Union was certified on September 9. The parties first met for contract negotiations on December 16. In January 1995, Respondent announced the elimination of the CPT department. In March 1995, Respondent contacted the Union in regard to an anticipated lapse in insurance coverage. The alleged unfair labor practices, with the exception of a discharge in January 1996, occurred in the foregoing context. The principal management officials involved in the alleged unfair labor practices are CEO Greg Smith, Vice President of Engineering Kenny Kirschstein,[6] to whom supervisor of the CPT department, Phil Anderson, reported until January 1995, and Vice President of Production Peter Mitchell,[7] to whom second-shift Supervisor Robert (Willie) Williamson reported.

B. The 8(a)(1) Allegations

The complaint alleges that on May 12, shortly after the election, Supervisor Williamson informed employees that breaktimes and the telephone usage and tardiness policies were being changed because of the employees' union activities. On May 12, Williamson met with the second-shift employees under his supervision. He prefaced his remarks saying, "[T]his is what you asked for. You asked for more structure. Congratulations. You got it.''[8] Williamson then announced that, effective the following Monday, there would be various changes including fixed, instead of flexible, breaks, a change in the practice regarding telephone messages whereby calls would be placed on a bulletin board, not put through to the employees, and a more strictly enforced tardiness policy. In response to an employee question regarding why this was happening, Williamson responded, "You wanted changes, you're going to get changes.''[9] Williamson acknowledged that his announcement was requested by Vice President Peter Mitchell who, in response to the organizational campaign, directed that all policies be more strictly enforced. Regarding the change in the break policy, both Williamson and technician Gwaltney confirmed that breakroom overcrowding was a problem on the first shift.

Williamson's announcement that the employees wanted change, or more structure, and then congratulating them when informing them of what they were going to get, could not have been more clear. The announced changes were not what the employees wanted. There is no evidence of any problem regarding the telephone or tardiness, and breakroom overcrowding was not a problem on the second shift. Employees on Williamson's shift had previously enjoyed a flexible break schedule. The announcement of the change in the break policy and more rigid enforcement of the telephone and tardiness policies, made as a congratulatory announcement on the heels of the union election victory, violated Section 8(a)(1) of the Act. *Fidelity Telephone Co*., 236 NLRB 166 (1978).[10]

The complaint alleges that, on May 19, Vice President Peter Mitchell advised that selection of the Union would adversely affect employees in that it would result in economic failure and loss of customers and job opportunities. On May 19 technician Doug Gwaltney met with Mitchell regarding what he felt was an unfair assignment of work by his supervisor, Williamson. After discussing that situation, Mitchell commented that since "you guys'' voted the Union in, the Company's stock had been crumbling. Gwaltney noted that Smith owned the Company and, unless he was manipulating something, the stock couldn't be crumbling.[11] Mitchell then mentioned having trouble getting customers and stated that the Company had to stop all expansion plans. Gwaltney also challenged this, noting that the Company had begun "caging'' in the parts room. Mitchell commented that the Company had to do that because of the Union and then noted that "I didn't mean to say that.''[12]

Mitchell did not specifically deny making any of the foregoing comments, and I credit Gwaltney's testimony concerning this conversation. His recollection of it was clear.[13] Although Gwaltney challenged the comments, Mitchell's reference to the employees voting the Union in, followed by statements relating to crumbling stock, loss of customers, and cessation of expansion plans, clearly conveyed the message that the employees' selection of the Union as their bargaining representative was futile. He cited no objective data in support of his statements. Respondent, through Mitchell's comments, violated Section 8(a)(1) of the Act.

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act by reducing the time allowed for performance improvement. Technician James Spencer, a current employee, supported the Union in the organizational campaign by speaking in favor of it and wearing a union shirt and button. In late April or early May, he received his semiannual evaluation from his supervisor, Williamson. Neither the Union, nor Spencer's union activity, was mentioned by Williamson or Spencer. The evaluation stated that Spencer was not performing up to expectations in various areas, specifically his backlog,

[6] Kirschstein had been vice president of both engineering and production until the two positions were split in February 1994.

[7] Mitchell is currently vice president of marketing. He assumed the position of vice president of production for about 6 months in February 1994. The current vice president of production, Fred Kramer, assumed that position in the summer of 1994.

[8] Technician Doug Gwaltney recalled Williamson prefacing his remarks by saying, "You wanted fixed policies, now you are going to get them,'' or words to that effect. He explained that an employee concern had been the absence of fixed policies regarding such matters as applying for shift changes.

[9] Technician Chris Myers recalled that Williamson mentioned the Union in reference to the employees wanting changes, but this was not corroborated. I find that Myers heard what Williamson meant, not what he said.

[10] It was Williamson's attribution of the changes to the employees' selection of the Union as their bargaining representative that constitutes the violation of the Act. An employer does not independently violate Sec. 8(a)(1) of the Act by making nondiscriminatory changes in the aftermath of a union campaign. *Waste Stream Management*, 315 NLRB 1088, 1090 (1994). As hereinafter discussed, Respondent had an obligation to meet and bargain with the Union regarding the change in the break policy.

[11] Mitchell testified that he did not specifically recall making the comment regarding stock, and then testified that Electrical South had no stock and was not publicly traded. In May 1994, the Company, although not having publicly traded stock, was a corporation, with Smith being the owner.

[12] Mitchell was not asked to what "caging'' referred, but his contemporaneous comment, that it was occurring "because of the Union,'' establishes that Respondent was taking some action in the parts room in response to the Union's election victory.

[13] Mitchell testified that his office had been "a revolving door'' at the time of the organizational campaign and election, thus explaining his lack of specific recollection. He admitted that he probably said that bringing in the Union could cause the Company to lose customers.

i.e., jobs assigned but not completed, or at least worked on, within 10 days. This same deficiency had been noted in October 1993. The evaluation concludes by placing Spencer on 30 days probation. There is no evidence of any other occasion when an employee was given 30, instead of 90, days in which to improve performance. Spencer's performance improved and, in October, he received a satisfactory annual evaluation, which is the evaluation that determines pay raises. He received a pay raise. Williamson explained that Vice President Mitchell was seeking to assure that jobs were handled in a timely manner and also was seeking to shorten the amount of time necessary to resolve problems. He stated that the shorter probationary period was "mainly'' because of what Mitchell wanted, and that union activity played no part in his action.

General Counsel did not allege this incident as a violation of Section 8(a)(3) and did not adduce documentary evidence relating to disparity of treatment. It is undisputed that Respondent's practice had been to place employees on probation for 90 days. There is no evidence of any other employee having been placed on 30 days probation. Nevertheless, on the basis of the Section 8(a)(1) pleading, there would be no alleged violation of the Act if Spencer had been placed on 90 days probation. I am unconvinced that this was a union related, instead of a production related, decision. Unlike the announcement of scheduled breaks and strict enforcement of the telephone and tardiness policies, Williamson did not made a comment alluding to employee union activity. The probation was imposed in the standard 6-month evaluation of employee performance, and I credit Williamson's testimony that union activity played no part in this action. I find that General Counsel has not established that Respondent violated Section 8(a)(1) of the Act by placing Spencer on 30 days probation.

General Counsel has alleged two instances in which Respondent allegedly created an impression of surveillance. The first of these relates to an interview between Vice President Kirschstein and engineer Flaherty, from which an allegation of interrogation also arises. During the 2 weeks prior to the election, engineer Glen Flaherty understood that Vice President Kirschstein was conducting individual meetings with employees. Flaherty had not been involved in the organizational campaign at the beginning. As it had progressed, he had become more involved. On April 28 or 29, Flaherty was told it was time for his meeting. The meeting was a closed-door meeting in Kirschstein's office. After preliminary pleasantries, Kirschstein stated to Flaherty that "rumor has it that you're a ringleader of the Union,'' and then looked directly at him for a response. Flaherty was unprepared for such a comment and did not say anything for a couple of minutes.[14] In the course of the meeting Kirschstein questioned Flaherty concerning what he expected to get out of the Union, whether he expected more money, more benefits.

Kirschstein did not address this meeting in his testimony, thus Flaherty's testimony is unrebutted. Flaherty's immediate supervisor was Anderson. Kirschstein was vice president of engineering. The credible testimony of Flaherty establishes that Respondent, through one of its highest executives, sought to confirm whether Flaherty had become a ringleader and to determine the strength of his support for the Union. Kirschstein's opening of the conversation by indicating he had heard a rumor that Flaherty was a ringleader, without identifying the source of the rumor, created the impression that his union activities were under surveillance. *Athens Disposal Co*., 315 NLRB 87, 98 (1994). This was no casual conversation. An employee had been called to the office of a vice president so that the vice president, by interrogation, could confirm whether the employee was indeed a ringleader. In so doing Respondent violated Section 8(a)(1) of the Act.

The second allegation regarding an impression of surveillance arises from a comment by Supervisor Anderson on June 6. Flaherty had, on behalf of the Union, attended a Southern Conference union meeting in Atlanta, Georgia. Upon his return to work Anderson asked if he had a good time at the union meeting. Anderson recalled hearing, through the grapevine, that Flaherty had attended a union meeting in Atlanta and vaguely recalled asking him how it went. Unlike the meeting with Kirschstein, there is no evidence of coercion in Anderson asking whether Flaherty had a good time at the union meeting. It was common knowledge that Flaherty was taking this trip to Atlanta on behalf of the Union. The casual asking if Flaherty had a good time did not violate the Act.

The complaint alleges two instances of interrogation, the one involving Kirschstein and Flaherty, discussed above, and another involving Kirschstein and Supervisor Anderson in March. At that time Russell Jenson, an employee in the CPT department, met with Anderson, his direct supervisor, and Kirschstein regarding his annual evaluation. Jenson was not a declared union adherent and had worn no buttons or pins. In that meeting, after reviewing Jenson's evaluation, which was positive, Kirschstein asked what Jenson thought about the Union and the election.

Anderson did not address this meeting in his testimony. Kirschstein vaguely remembered that the Union was discussed in this meeting, but he recalled no particulars. I credit Jenson. Vice President Kirschstein sought to determine Jenson's union sentiments. He did this in his office, in the presence of Jenson's immediate supervisor, and in the context of a formal meeting in which Jenson was receiving his annual evaluation. Given these circumstances, where an employee whose union sentiments were unknown was receiving his annual evaluation, I find the interrogation by a company vice president to be coercive. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In questioning Jensen, Respondent violated Section 8(a)(1) of the Act.[15]

The complaint alleges that, on May 9, Supervisor Anderson advised employees that their selection of the Union as their collective-bargaining representative had been futile, threatened plant closure, threatened closure of the CPT department, and threatened employees with unspecified reprisals.[16] On May 9,

[14] Flaherty's reaction suggests that, although he had gradually become more active in the campaign, he certainly did not consider himself a ringleader. Respondent did not establish that Flaherty's sentiments were generally known at the time this interrogation took place.

[15] The complaint also alleges that Kirschstein advised that it would be futile to select the Union at this meeting; however there was no evidence adduced in support of that allegation.

[16] The complaint also alleges comments relating to futility on April 20, 1994, and mid-January 1995. No evidence was adduced relating to any comments by Anderson on April 20. On January 17 or 18, after closure of the CPT department was announced on January 16, Flaherty related a conversation in which Anderson stated that he had argued to keep the department open but that Smith could not have cared less about the department's profitability, "all that Greg could keep talking about . . . was . . . our Union involvement.'' Anderson did not deny any

shortly after the election, Anderson spoke to employees of the CPT department. He stated that he felt as if he had been kicked or punched in the stomach, that the scuttlebutt was that the department had voted 9 to 1 in favor of the Union. He noted that his superiors held him personally responsible.[17] He told the employees that they had made a mistake. He then made the following statement:

> You know, Greg Smith basically could take his equipment and his customer base and move somewhere else tomorrow and basically close the doors here, so don't feel that just because you have a Union involved that is going to be the answer to all your questions, or all your issues that you have.[18]

Anderson concluded his remarks by saying the Company was going to hold the employees to the letter of anything they had in writing and the employees had better watch their backs.[19]

The complaint also alleges that on January 9, 1995, Anderson threatened closure of the CPT department. On January 9, 1995, Supervisor Anderson informed the CPT employees that management had been thinking about eliminating the CPT department and that the Union had been part of the reasoning, but that management had decided against it. When noting that the Union had been a factor, Anderson told the CPT employees that they "were still looked upon unfavorably.''[20]

Anderson's acknowledged statement establishes the allegations of futility and plant closure. I have credited the undenied testimony that the employees were told to watch their backs. This constituted a threat of unspecified reprisals. Informing the CPT employees that serious consideration had been given to eliminating the department, that the Union had been a factor, and that the CPT employees "were still looked upon unfavorably,'' constituted a not very veiled threat of closure of the department if the employees did not desist from their support of the Union. All of the foregoing constitute violations of Section 8(a)(1).

The complaint alleges that, in mid-August, CEO Greg Smith advised employees that their selection of the Union as their collective-bargaining representative had been futile and threatened plant closure. These allegations arise from a conversation between Smith and engineer Peter Adams. Adams met with Smith to discuss a problem with his paycheck, a problem with Vice President Kirschstein, and the Union. He had told Smith that he would vote against the Union, which he had. He reminded Smith of this and stated that now he intended to get involved because he did not particularly want the individuals that he expected to be elected to the bargaining committee to represent him. He continued, noting that he thought it would help if a more reasonable person, such as himself, was on the committee. Smith responded that it would not make any difference, there would be no contract. Smith commented that it would be nice to have a more reasonable person, but that he would not be at any negotiating session, that he was afraid he would get so angry he'd bring a gun and shoot somebody. He explained that he would hire a lawyer to negotiate for him and that the lawyer would negotiate until the doors closed.[21] He then added that he was obligated to negotiate, but he did not have to sign a contract. Smith went on to state that if the employees could ask for more, he could ask for less, saying that he could ask for everybody to take a 20-percent pay cut.

I credit Adams, whose recollection of the meeting was quite clear.[22] He went to Smith concerning the three issues noted above. He assured Smith that he had kept his commitment to vote against the Union, a commitment obviously made prior to the election. Smith then "sort of laughed'' and made the statements suggesting the futility of Adams' proposed plans, since

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of these comments. Although I do not find these comments to constitute a threat of futility, I do find them relevant in evaluating Respondent's motive for closing the department.

[17] In January 1995, when the engineers learned that elimination of the CPT department had been considered, but rejected, Anderson again reported that "they'' believed that the department had voted 9 to 1 or 8 to 1 in favor of the Union. Smith denied telling anyone that he believed the CPT department had voted 9 to 1 or 8 to 1 in favor of the Union, saying "I had no way of having access to those results, and how they voted. I didn't make that statement.'' On cross examination, Smith's testimony was demonstrated to be false when it was brought to his attention that the engineers had differently colored ballots since they had first to vote to be included in the unit with the technicians. Thus, contrary to his initial testimony, Smith did have access to the results. He was present when the differently colored ballots were counted. When reminded of this and asked whether the engineers' vote regarding inclusion in the unit was about 9 to 1, Smith answered "I guess that it was. I don't recall.'' When asked whether the vote for the Union was exactly the same, 9 to 1, Smith again answered "I guess that it was. I don't recall.'' After reconfirming Smith's presence at the count, Counsel for the Charging Party again asked whether the vote was 9 to 1, and Smith parried by asking, "Was it?'' Counsel responded "Does that sound right to you?'' Unwilling to make this critical admission, Smith responded, "If you say so. I don't recall the exact count.'' Smith was at the count and I find that he knew how the engineers voted, and that he told Anderson that he held him responsible for their actions.

[18] Anderson acknowledged making the foregoing statement. He also acknowledged that he took it personally that the CPT engineers, who voted to be part of the unit, had "voted in a Union.'' Anderson was asked no other questions regarding the comments he made on May 9.

[19] The above summary is from the mutually corroborative testimony of employees Allen Murray, Glen Flaherty, and the admitted statement by Anderson. Insofar as I have credited Anderson's acknowledged statement, I do not find that Anderson mentioned closure of the CPT department separately from closure of the Company at this time. Prior to this meeting Flaherty, the senior employee, had spoken privately with Anderson who had commented that he was concerned the Company might be looking for revenge.

[20] Anderson did not deny these comments.

[21] Adams recalled the similarity between this comment and one made by Smith prior to the election. He stated that Smith said the Company would not be unionized, he would close the doors first. Adams acknowledged that, in a prior statement, he had said that Smith had said "until the doors closed or until hell freezes over.'' He states that what he had meant was that Smith had fumbled for an expression and said "until the doors closed'' as if he were saying "until hell freezes over.'' Adams noted that Smith's public comments "changed'' after he received legal advice.

[22] Smith testified that he had several conversations with Adams, including one in which he says Adams informed him he was not for the Union, but was going to get involved in the process. In response to a question by Counsel for General Counsel, Smith testified that he did not recall what response he gave when Adams told him he was going to try to get on the negotiating committee. Despite his absence of recollection regarding what he did say, Smith purported to recall what he did not say. Thus, in response to specific questions posed by Counsel for Respondent, Smith denied saying there would never be a contract, that he would not be at negotiating sessions for fear of harming someone, and that he would hire a lawyer to negotiate until the doors closed. He acknowledged saying that he was not obligated to sign a contract, that he was only obligated to negotiate and that the Union could ask for more and he could ask for less. A specific question was not posed regarding his illustration of asking for everyone to take a 20-percent pay cut. I do not credit his denials.

there would be no contract; rather, there would be negotiations until the doors closed. I find that Respondent violated Section 8(a)(1) of the Act by advising that bargaining with Respondent would be futile and threatening plant closure.

The complaint alleges that Respondent unlawfully discouraged employees from wearing clothing with union insignia. On May 5 or 6, Flaherty wore a shirt with union insignia to work. Kirschstein commented that it was an awfully ugly shirt that he was wearing. About 2 hours later, Supervisor Anderson stated that wearing the shirt was unprofessional. Anderson acknowledged telling Flaherty that he should not flaunt his union adherence, not to wave it in everybody's face. Jenson overheard Anderson tell Flaherty that wearing the shirt was unprofessional. Allen Murray, another CPT engineer, testified that Supervisor Anderson stated that he would appreciate the engineers not wearing any paraphernalia, that it would not reflect well on the department or him. Regardless of how Anderson phrased his feelings regarding Flaherty's wearing of a shirt with union insignia, the message was clear. It was inappropriate for a CPT engineer to publicly display his support for the union in that manner. In so doing, Respondent violated Section 8(a)(1) of the Act. *DeMuth Electric*, *Inc*., 316 NLRB 935 (1995).

The complaint alleges that on four occasions, between September 1994 and January 1995, Supervisor Anderson discriminatorily promulgated a rule prohibiting discussion of union related matters. The evidence reveals only the September instance of promulgation. Regarding this instance, engineer Adams testified that, in September, the month in which the Union was certified, Supervisor Anderson, at a regular Monday meeting, told the employees not to discuss union activities or union issues while in the work area and thereafter, in the work area, reiterated that employees were not to discuss union issues during work time.[23] Employees previously had been permitted to engage in short conversations regarding any subject they desired. Anderson's remarks were related to conversation, not solicitation. This prohibition of conversation regarding union activities or issues was a selective gag rule, directed as it was only to union related matters. *Emergency One, Inc*., 306 NLRB 800 (1992). The promulgation of this rule by Anderson violated Section 8(a)(1).

C. Precertification 8(a)(5) Allegations

Respondent filed objections to the election of May 6, and the Union was not certified until September 9. During this interim period the Respondent made several unilateral changes and dealt directly with its employees. It is undisputed that there was no notice to, or bargaining with, the Union during this period.

The first alleged change relates to the break policy. This accounts for some five separate complaint allegations, two regarding direct dealing and three involving the unilateral implementation of, and reimplementation of, the changed break policy. The mutually corroborative testimony of employee witnesses and Supervisor Williamson establishes that, on May 12, a new policy of fixed, instead of flexible, breaks was announced, with two 10-minute breaks and a 30-minute meal break. Employees were polled, at that time, regarding the timeslots they wanted. Employees continued to voice their dissatisfaction with this change, specifically requesting that they be permitted to combine their 10-minute breaks. Thereafter, the employees on each shift were canvassed. This resulted in their being permitted to combine the two 10-minute breaks. This was effective at the end of May. The published policy in evidence is dated June 27, but it reflects that it supersedes the policy of May 30. The record does not reflect what changes, if any, are present in the June policy. Thus, the credited evidence reveals that Respondent unilaterally altered the employees' break schedules on May 12, when it announced the fixed break policy with two 10-minute breaks, and on May 30, when it implemented the altered policy permitting combination of the two 10-minute breaks. Respondent also dealt directly with employees concerning the scheduling of breaktimes and canvassed them regarding their desire to combine their two 10-minute breaks. In so doing, Respondent violated Section 8(a)(5) of the Act.[24]

The complaint alleges unilateral implementation of a new telephone policy on May 16. No separate memorandum of the policy was placed in evidence. The company handbook, which was published prior to the election, contains a telephone policy restricting telephone calls, except while on break or lunch, to emergencies.[25] As already discussed, on May 12, following the election, Supervisor Williamson announced that this existing policy would be strictly enforced. In so doing, I found that Respondent violated Section 8(a)(1) of the Act. Insofar as that policy was in effect as of at least January 1, there is no violation of Section 8(a)(5).[26]

The complaint alleges the creation of an assistant shift supervisor position, establishment of qualifications for that position, revision of the job description for the position, and the selection of employees to fill the position, all without notice to, or bargaining with, the Union. Vice President Mitchell confirmed that he created the position in an effort to improve communication and obtain additional input regarding employee performance evaluations. The document establishing this position was posted on May 15. The first responsibility listed is "service and complete jobs,'' i.e., perform bargaining unit work. There were nine of these positions created, three on each shift. The unilateral creation of new supervisory positions, whenever the newly created supervisors continue to perform their former duties as well, triggers an obligation to bargain. *Bridgeport & Port Jefferson Steamboat Co*., 313 NLRB 542, 545 fn. 12; *The Lutheran Home*, 264 NLRB 525 fn. 2 (1982). The Respondent's unilateral creation of a new level of supervision that involved the continued performance of unit work violated Section 8(a)(5) of the Act.[27]

[23] Anderson did not deny the promulgation of this prohibition.

[24] Respondent, in brief, argues that the establishment of scheduled breaks was privileged because it was in the planning and development stage prior to organizational activity, although no testimony specifically established when Mitchell determined to make this change. No case authority is cited for this legal proposition. *Mike O'Connor Chevrolet,* 209 NLRB 701 (1973), holds that an employer, pending certification, acts at its peril in making unilateral changes, unless there are compelling economic considerations for doing so. There is no evidence that there were any compelling economic considerations dictating this change. Respondent had, so far as the record shows, operated with a flexible break system since the opening of the Greensboro facility.

[25] The parties stipulated to the authenticity of the company handbook and further stipulated that it was in effect as of January 1, 1994.

[26] The tardiness policy was not alleged as a violation of Sec. 8(a)(5). I note that the employee handbook provides for progressive discipline regarding unexcused tardiness.

[27] The illegality in Respondent's action was the creation of a supervisory position which involved the performance of unit work. I find no violation in Respondent's establishment of qualifications for the super-

The complaint alleges the unilateral change of Respondent's disciplinary procedure regarding its tobacco products and smoking policy. The company handbook provides that smoking is prohibited except in the designated smoking area. A policy dated May 17 permits smoking only in employee vehicles at break and lunchtimes. It further provides that violation of the policy will result in a warning for a first offense and termination for the second offense. The policy notes that it supersedes a memo that appears to have been published on November 5, 1993. That memo was not placed into evidence. Technician Stuart Redden testified that, so far as he knew, the disciplinary measures for violation of the smoking policy were new. No witness for Respondent disputed this testimony. The company handbook provides a list of major offenses, which can result in immediate termination, and a list of minor offenses, which are subject to the progressive discipline of two warnings prior to discharge. Smoking is not on either list. The smoking policy, therefore, established a new offense as well as a new category of offense, discharge after one warning. By unilaterally changing the disciplinary procedure for violation of its smoking policy, Respondent violated Section 8(a)(5) of the Act.[28]

On September 1, Respondent, for the first time, established a written parking policy. That policy included a provision that employees move their vehicles within 5 minutes of the end of a shift. Vice President Kirschstein testified that the policy became necessary when employees began deviating from the unwritten policy whereby office people parked in front of Respondent's facility and technicians and production people parked behind it. Employees were, in fact, deviating from the unwritten policy; they also were parking on the side of the facility. He acknowledged that the requirement that employees move their vehicles within five minutes of the end of the shift established a new requirement.[29] Respondent's formalization of its parking policy to a written document made any employee who violated that policy subject to the Company's disciplinary system which provides two warnings and then discharge for "failure to follow instructions, either written or oral.'' I find that the unilateral implementation of this policy and provision for discipline for violation of it violated Section 8(a)(5) of the Act.

The complaint alleges that on July 1, Respondent unilaterally implemented changes in its employee bonus program. The Company's bonus program provides that all eligible employees receive a pro rata share of shop revenue per hour that exceeds a minimum dollar threshold.[30] The average hourly production figure which triggers the plan, that is, the threshold at which a bonus is being earned, changes annually. CEO Smith explained that the bonus threshold was changed in July each year to reflect increases in prices as reflected in the Company's June price book. Documentary evidence reveals that the figure in 1993 had been $76.25, as of July 1, 1994, it was $77.02. Currently the threshold is over $80. The bonus is a term and condition of employment, but the record establishes that it was altered pursuant to a set formula. Respondent's adjustment of the threshold figure in accord with its past practice did not violate the Act.[31]

Respondent published a list of electrical safety rules on May 6. The document indicates that it supersedes a document dated in 1992. The only witness to testify regarding this document was employee Redden who did not dispute that rules had previously existed. He was unaware whether any changes were made. General Counsel has not established what rules, if any, were unilaterally implemented. I find no violation regarding the electrical safety rules.

The complaint alleges, as two separate violations, the unilateral implementation on June 2 of a bidding procedure for the filling of job vacancies and, on June 21, a change in that procedure. The bidding procedure dated June 21 states that it supersedes a June 2 document; the June 2 document, however, is not evidence. Vice President Mitchell testified that he created the policy in response to employee complaints about how folks were getting moved when there was a vacancy. He noted that employees felt it was not happening in a fair way and was causing discontent.[32] Mitchell is corroborated by technician Gwaltney. Gwaltney testified that the Company kept changing the rules and that it was in this regard that they wanted fixed policies. Notwithstanding the foregoing, employee complaints do not excuse an employer from its statutory obligation to bargain. Respondent's establishment of an objective written policy regarding the filling of job vacancies by a formal bidding procedure constituted unilateral implementation of a term and condition of employment in violation of Section 8(a)(5).[33]

D. The 8(a)(3) Allegations

1. Changed duties, verbal warning, and adverse evaluation of Doug Gwaltney

a. Facts

Technician Doug Gwaltney was involved in the organizational campaign from its inception. At a meeting on March 7, Smith spoke with employees, expressing his disappointment that the employees were seeking union representation rather

visory position, except insofar as the announcement incorporated the job description which included the performance of unit work.

[28] Respondent argues that since Redden testified that the smoking policy did not affect his wages, hours, or working conditions, it did not violate Sec. 8(a)(5) of the Act. Contrary to Redden, I find that the policy does indeed affect working conditions. It establishes a new dischargable offense. The complaint and Redden's testimony relate to the establishment of discipline for violation of the policy. There is no question that Respondent had a restrictive smoking policy prior to May; however, the handbook did not list smoking in an undesignated area as a specific offense under either of the disciplinary categories. It was incumbent upon Respondent, in the face of General Counsel's persuasive evidence, to present evidence showing that smoking in a nondesignated area was a dischargable offense after one warning prior to May 17. It did not do so.

[29] I reject Respondent's argument that this was not a term and condition of employment. *Treanor Moving & Storage Co*., 311 NLRB 371, 386 (1993).

[30] The amounts also depend on various adjustments, as set out in the bonus program policy.

[31] Counsel for General Counsel cites *Casa San Miguel*, 320 NLRB 534 (1995) for the proposition that the change did violate the Act. Unlike *Casa San Miguel*, in this case there is evidence that Respondent "relied on pre-established guidelines or formulae'' in determining the adjustment to be made to the bonus threshold. Id. at 600.

[32] Mitchell's testimony was somewhat self-contradictory. He testified that, in response to an employee complaint, he agreed with the employee saying "we need to have an objective way to do this.'' He then quickly added that Respondent did have an objective way, it just was not documented so that people could see it.

[33] There is no evidence contradicting Mitchell's testimony that the document of June 21 simply corrected errors in wording in the policy implemented on June 2.

than trying to work out any problems with management and without the Union. He made reference to bad campaigns and Gwaltney responded that a bad campaign could be avoided if Smith would simply accept the Union.

In mid-March, following this meeting, Gwaltney began to receive fewer micro processor temperature control units and more analog temperature controllers. This did not affect his hourly pay rate; however, it could affect his efficiency, which in turn would have an impact on his evaluation. The chief factor evaluated by Respondent when granting merit increases is the employee's efficiency. This is determined, in large part, by the amount of work that the employee completes and that is billed to the customer. The amount of work billed will vary with the speed at which the employee completes the work and the cost of the repair. Each item being repaired is priced with the dollar amount that the customer will be billed. An employee's efficiency is enhanced when he quickly repairs "high dollar'' items. Gwaltney was less familiar with the analog temperature controllers, and some of them were lower dollar items; thus, he believed his efficiency would be adversely affected.

On May 16, at 10:30 p.m., half an hour before quitting time, Gwaltney engaged in a short conversation with fellow employee Lee Sprecker. Sprecker had only recently returned to work for Electrical South. They were working in the same cubicle and Sprecker came to where Gwaltney was working. They talked for approximately 2 minutes. Supervisor Williamson observed them talking. Gwaltney was off work the next day. On May 18, when he reported to work, Supervisor Williamson called him into his office and stated that he was giving him a verbal warning. Gwaltney asked what policy he had violated and Williamson replied that he was paid for an 8-hour day and the Company expected him to work an 8-hour day.

On May 19, Gwaltney discovered that three higher dollar jobs had been removed from his bench. He complained to Peter Mitchell. In the course of the conversation Gwaltney noted that one of the higher dollar jobs had been given to an antiunion employee, questioning whether it was company policy to discriminate against employees who supported the Union and stating that he would go the NLRB. Mitchell assured him that such was not the case and that he would look into the matter. There is no further complaint of altered work assignments after this meeting.

In late May, Gwaltney received his annual evaluation. His overall rating was "needs improvement.'' The evaluation specifically notes that Gwaltney's efficiency had not improved and the number of jobs shipped had declined. Despite the less-than-satisfactory rating, Gwaltney received a 50-cent-an-hour pay increase.

Prior to the organizational campaign, Supervisor Williamson had experienced problems with Gwaltney's work, and, on February 21, he issued him a warning for not properly scanning his jobs. Because of his failure to scan, the Company's paperwork showed a particular job as awaiting parts, whereas actually the job was on Gwaltney's bench awaiting repair. Williamson explained that work was constantly shifted to keep backlogs at a minimum. He did not address the assignment of work to Gwaltney in March and April, but he did note that Respondent repaired both analog and digital temperature controls. He explained that if an employee chose to work on high dollar jobs, leaving a backlog of low dollar jobs, that it would be unfair to reduce the backlog by moving the lower paying jobs to another technician. To combat what he called "cherry picking,'' his policy was to reassign the higher paying jobs. The offending employee would, therefore, have to deal with the backlog. He acknowledged using this management tool with regard to Gwaltney in May.[34]

Williamson confirmed giving the verbal warning to Gwaltney in May. He walked by Gwaltney's cubicle and observed Gwaltney and Sprecker in conversation. Although he did not recall specifically what they were discussing, he heard enough to be certain that it was not work related.[35] He returned a few minutes later, and "it was still going on.'' He did not say anything to them at the time, but he acknowledged that, on other occasions, he would say, "[H]ey, guys, let's cut the crap and get back to work.'' This is confirmed by Gwaltney's November 1993 evaluation which notes that Gwaltney needs to be careful about getting in "lengthy conversations about politics or hobbies.'' No warning was issued as a result of those conversations. Indeed, there is no evidence of any employee being warned for having a nonwork-related conversation until May 18. Williamson explained that Mitchell had told him to "tighten up,'' and that Mitchell had told him to tighten up in response to employee union activity. In this regard, Williamson reported that there was a concern that "people would be so involved in that (union activity), that there would be a loss of productivity.''[36]

b. Analysis and concluding findings

The complaint alleges that Respondent changed Gwaltney's job duties, resulting in a lower performance evaluation and lower raise, and issued a verbal warning, due to his union activities. Gwaltney was actively involved in the union organizational campaign and Respondent was aware of this. Respondent was opposed to organizational activity by its employees, and the record establishes animus. Despite the foregoing, the record also establishes that Gwaltney was experiencing performance problems well before any organizational activity began.

Respondent, in assigning work to its employees, is dependent upon what work is being sent for repair. Williamson confirms that work is constantly shifted around. The three jobs which Williamson moved, due to alleged "cherry picking'' by Gwaltney, were moved in May.[37] "Cherry picking'' is not commented upon in Gwaltney's evaluation. Although Gwaltney may have felt that the assignment of the less familiar analog timers in March and April adversely affected his performance, the analysis attached to his evaluation reflects that, over the last

[34] Gwaltney presented sheets from 2 weeks in March that reveal that he had not chosen the high dollar jobs. Indeed, it appears that he never even had that opportunity since Williamson moved a job to the top of the list, ahead of other jobs. Gwaltney did not testify that any work was reassigned from his bench in March. No documents from May were presented. The reassignment of the three jobs, coming as it did immediately after Gwaltney's verbal warning, causes me to question the legitimacy of this action. Nevertheless, the data Respondent used to evaluate Gwaltney's performance were April 1993 through April 1994, and there is no evidence that this one time reassignment had any effect upon the evaluation.

[35] Williamson acknowledged that the conversation could have been about the Union, but he did not remember.

[36] Williamson acknowledged that the conversation could have been about the Union, but he did not remember. This is consistent with the more strict enforcement of the telephone and tardiness policies which Williamson had announced shortly after the Union's election victory.

[37] The removal of the three jobs was presented as evidence of changed job duties, i.e., restricting Gwaltney to low-dollar jobs.

6 reported months, November 1993 through April 1994, Gwaltney had negative efficiencies for each month except March and April. His efficiencies actually improved and were positive in March and April.[38] The evaluation does comment upon time spent on each job averaging over 4 hours, but this was true for the months of November through February as well. Comments from the 6-month evaluation, in November 1993, appear on the annual evaluation. Those comments confirm the scanning problem for which Gwaltney was warned in February. In view of the foregoing, I find that General Counsel has not established that Gwaltney's bench assignments from mid-March until mid-May were discriminatory, nor that they accounted for his less-than-satisfactory annual evaluation.[39] I note that his earnings were not affected during this 2-month period. I further note that, notwithstanding the less-than-satisfactory evaluation, Gwaltney received a 50-cent-per-hour pay increase.[40] Respondent did not violate Section 8(a)(3) with regard to Gwaltney's job assignments and May 1994 evaluation.

Respondent tolerated conversations among its employees prior to the union campaign, even when those conversations did not relate to work. Indeed, Gwaltney's November evaluation does not caution him about conversations, but about "lengthy conversations.'' There is no evidence of any employee ever having received a warning for having a nonwork-related conversation until Gwaltney and Sprecker were warned on May 18. Williamson's testimony that he would break up conversations in order to get employees back to work reveals Respondent's past practice. He did not follow his past practice and merely break up the conversation on May 16.[41] Instead, consistent with Mitchell's order to "tighten up,'' Respondent issued a formal verbal warning to union activist Gwaltney on May 18.[42] Respondent's pattern of discipline, made in response to employee union activity, establishes a prima facia case of discriminatory motive. *Keller Mfg. Co.,* 237 NLRB 712, 713 fn. 7 (1978). Respondent did not establish that increased discipline was unrelated to employee union activity; indeed, Williamson acknowledged that it was in response to that activity. In issuing a formal verbal warning to Gwaltney, Respondent violated Section 8(a)(3).

2. Warnings to David Albertson and Charles Trotter

a. Facts

On March 11, technicians David Albertson and Charles Trotter had scanned out and were on break. They observed employee Lam Tran, who worked in shipping, returning from the restroom. They called to him and solicited him to sign a union authorization card. The conversation lasted less than 5 minutes.[43] Since Tran was out of his area, both Albertson and Trotter assumed that he, too, was on break.

Respondent has a rule that prohibits solicitation during working time, noting that working time means the working time of either the solicitor or solicitee.[44]

On March 15, Albertson and Trotter were called to Peter Mitchell's office and given identical written warnings that had already been prepared. They were not asked to explain the circumstances under which they had spoken to Tran. The warnings state that they violated the Company's no-solicitation rule because, while Tran was on the clock, "he was approached'' by them. As noted above, the uncontradicted testimony is that Tran voluntarily went to Albertson and Trotter when they called to him.

Mitchell testified that he gave the warnings because "that was outside of Federal guidelines.'' He did not state what Federal guidelines. Respondent presented no evidence that Tran was not on break. Notwithstanding the reference on the warning notices to Respondent's rule, Mitchell testified that "we were going to do it by the book. This was the first event . . . [of] folks soliciting for the Union.''[45]

b. Analysis and concluding findings

Both Albertson and Trotter testified that, so far as they knew, no supervisor observed their solicitation of Tran. Respondent presented no evidence from any person who witnessed the solicitation. Tran was out of his work area, returning from the restroom. Because he was out of his area, both Albertson and Trotter assumed that he was on break. The failure of Respondent to establish that Tran was not on break precludes a finding that Respondent's no-solicitation rule was broken. Mitchell, in testimony, referred to "Federal guidelines,'' saying that the warnings were given because "we were going to do it by the book.'' He then stated, "This was the first event . . . [of] folks soliciting for the Union.'' This admission of a change in Respondent's approach due to employee union activity establishes a discriminatory motive. *Keller Mfg., Co*., supra at 713 fn. 7; see also *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987). There is no probative evidence that Tran was not on break. Under *Wright Line*,[46] I find that Respondent has not established that the warnings would have been given if the solicitation had been for some purpose other than to assist the Union. Thus, by issuing the warnings, Respondent violated Section 8(a)(3) of the Act.

3. Elimination of the CPT department

a. Facts

In 1992, Respondent began forming the CPT department. Engineer Glen Flaherty was recruited from a firm in Massachu-

[38] I have no doubt that Gwaltney believed himself to be receiving more than his fair share of the analog timers. The record does not establish whether this was, or was not, true. To his credit, Gwaltney worked diligently on his assigned job tasks and actually improved his efficiency rating from prior months.

[39] The evaluation was based on data through April. There is no evidence that the alleged "cherry picking'' in May played any part in the evaluation.

[40] The average merit raise in 1994 was 83 cents per hour.

[41] Williamson did not testify to how long he was absent before observing that the employees were "still talking.'' He did not inquire of the employees to determine whether he had observed two short conversations.

[42] The warning to Sprecker was not alleged in the charge or complaint. Sprecker had only recently been rehired and did not immediately become active in the Union, thus I shall assume that he did not report having received it to the Union. General Counsel did not seek to amend the complaint in this regard.

[43] Albertson testified that Tran signed at that time; Trotter testified that Tran took the card with him.

[44] Testimony establishes that multiple solicitations have occurred, and there is no evidence establishing warnings for violation of the rule prior to the advent of the Union. Nevertheless, General Counsel did not establish either that these solicitations took place other than on breaktime or, if not on breaktime, that supervision was aware of them. I do not, therefore, base my finding upon any alleged disparity.

[45] Respondent's warning of employee Rash, who "lost control'' and was making a speech, does not establish the absence of disparate treatment.

[46] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

setts. He began work in August 1992. He worked under the supervision of John Riffle, manager of research and development,[47] until October 1993, when Phil Anderson was hired as supervisor of the CPT department. Riffle explained to Flaherty that Electrical South wanted to attract business as a single source for all of a company's industrial electronic repairs. To do this, it needed to develop the capability to repair computer boards for which there were no schematics or manuals. Russel Jensen began working with Flaherty in December 1992, and Respondent increased the employee complement in 1993. At the time of the election there were nine or ten employees in the department. On December 1, shortly before elimination of the department in January 1995, Dwayne Linden was hired. With his hire, the employee complement was eight.

Critical to the diagnostic procedure used to determine which computer chip in a board was not functioning properly was a specialized micro controller, the Schlumberger 635 Functional Board Test System, referred to as the Slumber J. Flaherty was involved in the purchase of Slumber Js. Following the initial purchase of one Slumber J from Flaherty's former employer, Respondent purchased four Slumber Js in 1993 and two in 1994, a total of seven. The invoice for the last one was purchased is dated November 1 and reflects that it cost $19,500. The machines cost over $60,000 when new. Respondent purchased used machines at prices ranging from $10,000 to $25,000.

Prior to creation of the CPT department, "high end'' repairs for boards with no schematics either had to be outsourced, i.e., sent to a company that did that type of work, or returned to the customer unrepaired. CEO Smith explained that, when the CPT department was created, he and Kirschstein had envisioned a department in which the engineers would develop testing programs that could be turned over to a component test shop. It was hoped that this shop, operating parallel to the general repair shop, could perform repetitive repairs, but at a higher cost to the customer than the general repair shop. This never materialized because the work coming in turned out not to be repetitive. At some point in late 1993 or early 1994, Respondent placed a technician in what it designated as the CPT shop. This was discontinued in June or July, following discussion between Smith and Kirschstein, and the technician was moved back to the general repair shop. Smith said that action was taken because "there was not enough repetitive repair work'' coming in.[48] No action was taken regarding the CPT engineers. Smith explained "we were getting mainly . . . onesie and twosie type repairs, and to keep it (the CPT department) going, that's what it appeared[;] it was going to stay.''

The net profitability of the CPT department was over 30 percent for 4 out of the last 6 months of 1994. The department generated a net profit of $233,514.72 in 1994. It sales were approximately $950,000. In December its sales exceeded $100,000 for the first time. The annual net profit figure in percentage terms was 24.57 percent. The repair shop, where the technicians worked, had a net profit percentage of 32.19 percent with sales of over fourteen million dollars.[49]

Despite Smith's statement that the CPT department was going to stay, and notwithstanding its performance over the last 6 months of 1994, it was eliminated in January 1995. Testimony regarding the decision to eliminate the department is scant. Smith testified that he did not consult with Anderson, the supervisor of the department, or with Vice President of Production Kramer. The CPT department had been placed under Kramer in January 1995. Smith states that he had continuing discussions throughout 1994 with Kirschstein regarding the viability of the department, but in January 1995, when Smith made the decision to close the CPT department, it was under Kramer. Kirschstein could recall no conversation in which Smith proposed eliminating the department. The only reason he recalls being given by Smith was in a management meeting when Smith stated that the return on investment and profitability of the department was not up to expectations.[50]

On January 9, 1995, Supervisor Anderson informed the CPT engineers that the department had been placed under Vice President of Production Kramer. He stated that the department had just barely missed being eliminated, and that the Union had been a factor, and that the CPT employees "were still looked upon unfavorably.'' Despite this, due to the capital equipment and output of the department, it was being retained.[51]

The Union and Company had met for their first negotiating session on December 16. Only one person was present for the Company, its attorney Todd Cline. The Union protested the absence of any representative of management who was actively involved in the management of the Company. The second negotiating session was set for January 14, 1995. Smith attended the beginning of this session and announced that the Company intended to eliminate all salaried engineer positions, the CPT department and a support department known as the ATE de-

[47] Flaherty was interviewed by Riffle but did meet Smith. Prior to his involvement in union activity, Flaherty described his relationship with Smith as cordial, recalling an evening when Smith and his wife happened to be eating at the same place as Flaherty and his wife. Smith praised Flaherty's work and the work of the CPT department. He noted that Smith would also come over and talk to him at work. After Flaherty become involved with the Union, he could recall no occasion when Smith "uttered a word'' to him, even ignoring casual acknowledgments when passing in the hall or entering or leaving the breakroom.

[48] Counsel elicited testimony from Smith regarding concern about the warranty rate of the CPT department. This was not a reason he cited contemporaneously with the closing of the department to either Respondent's management or the Union. I also note that he did not mention a problem with warranty work when he first addressed the closure of the department in his direct testimony. It was only after counsel directed his attention to a document showing warranty rates that such testimony was given.

[49] Respondent also computes the average hourly output of its employees. Respondent's monthly bonus is paid for production in excess of the threshold which, as of July 1994, was $77.02. The bonus program policy, which sets out this threshold, states that the average is based on shop revenue generated by the general repair shop. The policy specifically excludes component test from the computation. Although Smith testified that the CPT average hourly output of $58.53 was not acceptable, Counsel for Respondent was incorrect when he phrased his question concerning this as being an acceptable return on investment. Return on investment is determined by profit, not gross production. No document sets any goal for average output per hour for the engineers.

[50] No figure was stated regarding what was acceptable profitability. Kramer, like Kirschstein, was not consulted regarding the elimination of the department. He heard about it during a Monday staff meeting. When asked about the reason given by Smith, Kramer testified: "Not much of a reason. Greg basically stated that it wasn't living up to his expectations.''

[51] Respondent did not to question Anderson concerning this meeting. The record does not reflect whether it was with Smith, Kramer, or both.

partment.[52] He stated that there had been "a change in direction in the Company,'' that these departments produced results over the long term, but the Company "no longer wished to be involved in that end of the business.''[53] On January 16, 1995, the engineers were given a memorandum from Smith confirming their elimination. That memorandum stated:

> Recently, I met with other management officials of the Company to discuss the direction of our Company. In view of current competitive pressures, we have decided to concentrate our efforts on the products that we presently service. This decision will allow us to refocus on our competition and the needs of our present and future customers.

Supervisor Anderson had kept figures relating to the performance of the CPT department. On January 16, 1995, he generated two documents, one containing the raw data, and the other a graphic presentation of that data. He met with Smith. On January 17 or 18, following his meeting with Smith, he spoke privately with Flaherty, the senior engineer. Anderson told Flaherty that he had shown Smith the numbers and requested a 6-month probationary period to see if the department could improve its numbers. He reported that "all Smith could keep talking about was the Union . . . our (the engineers) Union involvement.'' He told Flaherty that Smith did not care about the department's profitability or trends, "it didn't matter.''

Despite the elimination of the CPT department, Respondent continued to advertise itself as a full service repair facility. The 1995-1996 services catalog reports that Respondent performs Function Component Test. All the Slumber Js were moved to the repair shop floor. Functional tests continued to be performed, but they were performed by the more experienced technicians rather than the CPT engineers.[54]

On January 23, 1995, the Union was informed that the CPT engineers would be paid through January 31, but were not to return to the plant due to rumors of sabotage. The Union was also informed that, since the employees did not work an entire month, they would not receive their January bonus under the bonus program.

b. Credibility

The foregoing facts create a dilemma in assessing the credibility of CEO Smith. If, as he told the Union at the bargaining table and the employees in his letter of January 16, 1995, the decision to eliminate the CPT department related to the "direction of the company'' or a decision to "refocus our efforts in other areas,'' such a decision would be at the "core of entrepreneurial control.''[55] Indeed, he told Raynor that Respondent "no longer wanted to be involved in that end of the business.'' Contrary to these representations to employees and the Union, Smith told management that the decision was made because return on investment and profitability were not up to expectations. He did not, at that time, elaborate on what an acceptable level of profitability was. If, in fact, profitability was the issue, the high salaries of the engineers certainly would be a factor to be addressed.[56] Smith, however, did not assert insufficient profitability when dealing with the Union.[57]

Smith's memorandum to the affected employees dated January 16, 1995, is not truthful regarding the manner in which the closure decision was made. Smith did not meet "with other management officials to discuss the direction of our Company.'' Smith specifically denied having any conversation with Anderson or Kramer, who was over the CPT department in January. Kirschstein confirmed that he was not consulted, although Kirschstein had been consulted when the decision had been made to discontinue the unprofitable CPT shop and to reassign the one employee who was assigned to it. Indeed, Smith consulted with his managers regarding virtually every business and cost decision that was made. He personally approved every merit wage increase. Mitchell testified that, when he served as vice president of production, he met with Smith every day, or every other day, and "we would go through a whole shopping list of issues from equipment that we were wanting to buy, new clean room we were trying to get fixed[,] . . . all issues for the Production Department.'' Kirschstein testified that "it was customary for us to have ongoing discussions about every department'' and that "I had to justify the existence of every department in that company throughout the year,'' including purchases of equipment. In view of Smith's consistent consultation with his managers regarding business decisions, his failure to engage in any consultation whatsoever regarding the closure of the CPT department compels the conclusion that it was not a business decision.

Counsel for Respondent did not question Supervisor Anderson regarding his statement to the engineers regarding management's reaction after the engineers had voted 9 to 1 for the Union. Indeed, Counsel chose not to question Anderson about various critical conversations. In his abbreviated testimony, Anderson acknowledged that he had sought to have the engineers remain out of the unit, to "make a stand on our own.'' After the engineers voted both to be included in the unit and to be represented by the Union, he told them that he felt they did not trust him, did not see him as their leader. "I kind of took it a little personally that they went and voted in a Union based on

[52] After various personnel changes, the ATE department was retained. It is not an issue in this proceeding.

[53] The substance of Smith's remarks is taken from the credible testimony of Harris Raynor, assistant southern regional director of the Union. Smith did not recall what he told the Union regarding his reason for eliminating the CPT department.

[54] Russell Jensen returned to work as a technician. He identified five technicians on the second shift who had used the Slumber Js in performing functional component tests, three of whom did so regularly, including Jeff Stevens, whom Jenson trained. The technicians did not, normally, create the software programs that the engineers had, but some technicians did modify programs that the engineers had created. They did perform functional component tests.

[55] Cf. *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 223 (Stewart, J., concurring) (1964).

[56] In August, Smith had told Adams that, at bargaining, he could ask for less, a 20-percent pay cut.

[57] Following the announcement of the closure due to a "new direction'' and not being "involved in that end of the business'' the parties engaged in bargaining over the effects of the decision. If Smith, at the bargaining table, had asserted profitability, the reason he stated to management, an obligation to bargain regarding the decision may well have arisen. *Dubuque Packing Co.,* 303 NLRB 386 (1991). Evidence adduced at the hearing reveals that Respondent, since that announcement, has simply substituted technicians and subcontractors (outsourcing) for the engineers in performing the component test work. The complaint alleges the elimination of the department solely as a violation of Sec. 8(a)(3). Respondent, in its answer, asserts that General Counsel is estopped from litigating the elimination of the department as an unfair labor practice, apparently because of the effects bargaining. Respondent did not argue this defense at the hearing or in its brief. I reject it. The effects bargaining was predicated upon what the record establishes was a false representation to the Union.

the prior discussions we had had about that sort of thing.'' Counsel for Respondent chose not to question Anderson regarding any discussion regarding the CPT department being placed under Kramer or his attempt to show Smith the trends in department. It was after the latter conversation that Anderson reported to Flaherty that Smith did not care about the department's profitability, all he could talk about was the engineers' involvement in the Union. The failure to question Anderson regarding these crucial conversations gives rise to an inference that, if questioned, Anderson's responses would have been unfavorable to Respondent. *Advanced Installations, Inc*., 257 NLRB 845, 849 (1981).

Smith's contradictory representations regarding the reason for his unilateral decision to eliminate the CPT department undermine his credibility. His inability to remember what he said on crucial occasions cause me to question how he supposedly remembered what he did not say. In this regard, I note that, when questioned regarding the reasons given to the Union for closure of the department, Smith replied that they were "economic reasons,'' but he did not recall how much detail he got into. When pressed as to whether they were the reasons to which he had testified, Smith replied "I don't recall.'' In fact the Union was not given any economic reasons. The Union, like the employees, was told that the decision represented a "change in direction'' and that "the Company no longer wanted to be involved in that end of the business.'' In fact, Respondent did remain in "that end of the business,'' as confirmed by its services catalog and testimony that technicians, instead of engineers, continued to perform component tests. I was unimpressed by Smith's demeanor when it was brought to his attention that he had been at the count and observed the differently colored ballots being counted. His unwillingness to acknowledge the results which he witnessed, after having affirmatively testified that he had "no way of having access to those results,'' convince me that Smith would not knowingly admit to anything that he believed would be adverse to Respondent's case. I specifically discredit his denial that when Anderson came to him with the two sheets of paper, one of which graphically depicted the trends in the CPT department, nothing was said with regard to the Union or the Union being a factor in the decision to close the CPT department.[58]

c. Analysis and concluding findings

Respondent was aware that the CPT engineers had voted overwhelmingly for union representation. This action on their part had upset Anderson who, by his own admission, "took it a little personally that they went and voted in a Union[,] based on the prior discussions we had. . . .'' The engineers had voted 9 to 1, and the one employee who cast a negative vote, Adams, told Smith in mid-August that he was going to get on the negotiating committee.

The record establishes Respondent's animus. Its vice presidents and supervisors interrogated employees and threatened plant closure and futility. Discriminatory warnings were issued. The chief executive officer advised that the selection of the Union would prove to be futile and threatened closure.[59]

Respondent contends that the decision to eliminate the CPT department resulted from sound business judgment, the three reasons cited by Smith at the hearing. The first of these, the absence of repetitive repairs, which had led to the closure of the component test shop in the summer of 1994, did not lead to closure of the department at that time. Indeed, Smith knew at that time that the engineers were performing "onesie and twosie type repairs,'' but the department "was going to stay.'' The third reason, a high warranty rate, although testified about, was never cited as a basis for the decision at the time is was made.[60] The second reason to which Smith testified was profitability. Counsel for Respondent seeks to combine Smith's conflicting statements regarding the reason for closure by arguing that, by eliminating the CPT department, which had generated a profit of almost one quarter of a million dollars in 1994, Smith "could change the direction of the Company's focus and concentrate on other aspects of the business, thereby improving short-term efficiencies and generating even higher profit levels.'' Smith testified that, in January 1995, it was time to "[c]ut my losses and move on'' He ultimately agreed that by "losses'' he was referring to the 24-percent net profit generated by the CPT department. Contrary to Smith's statements, there was no change in direction. Respondent continued "to be involved in that end of the business.'' Component test work that could be performed in the shop was performed. Work that could not be performed was outsourced. The parties stipulated that work that is outsourced is far less profitable than the component test work that had been performed in the CPT department.[61] In short, the elimination of the CPT department was not a business decision.[62]

Smith was not truthful when he stated that the decision to eliminate the CPT department followed discussion with "other management officials.'' He told his managers that the decision was based upon profitability; however, when Anderson begged to keep the department "all that Greg [Smith] could keep talking about . . . was . . . our Union involvement.'' He "couldn't have cared less about what our real profitability, what our trends were.'' Smith told the Union that Respondent "no longer wished to be involved in that end of the business,'' but Respondent continues to be involved in the business of performing

[58] When asked if he recalled Anderson presenting him with those documents, Smith replied "He may well have.'' It is not established that Kramer was present at this conversation. Smith did not recall, and Kramer did not remember seeing any documents. I do not credit Kramer's denial that Smith mentioned the Union in this, or any other, conversation.

[59] Smith told Adams that he was not going to attend bargaining sessions, that he was going to hire a lawyer to bargain for him "until the doors closed.'' At the initial bargaining session, only Attorney Todd Cline was present for the Company.

[60] Smith acknowledged that, given the nature of the work, CPT department repairs were anticipated to have a higher warranty rate, i.e. products returned after they failed to work properly. He could cite no tangible evidence that warranties were affecting the business, only a concern that this "would'' affect the Company's other business.

[61] The specific stipulation was that, in 1994, the net profit percentage of the CPT department was more than three times as great as the net profit percentage in the outsourcing department.

[62] In arguing that Respondent's business judgment not be second guessed, Respondent cites *Jumbo Produce*, 294 NLRB 998 (1989) in which a business decision was made to close the potato and bean packaging portion of the shipping department. The decision was found justified in view of evidence that the respondent's machinery kept breaking down and there were no repair parts available. An alternative method of packaging had been investigated, but it was determined to be uneconomical. The record herein establishes nothing uneconomical in the operation of the CPT department.

functional component tests. It has kept all seven Slumber Js and, with the help of skilled employees such as Jenson, who returned as a technician, has trained technicians to perform these tests. Respondent continues to advertise itself as having this capability. There was no decision to eliminate the CPT department when, in the summer, Kirschstein and Smith decided to eliminate the unprofitable one employee CPT shop. In November another Slumber J had been purchased. In early December another engineer had been hired. In early January 1995, Smith had placed the CPT department under Kramer.[63] The foregoing actions are consistent with the operation of an ongoing department. Anderson was told that the department had been placed under Kramer and was not going to be eliminated. He reported this to the employees on January 9, 1995. In the next 5 days, prior to the negotiating session on January 14, 1995, Smith alone decided to eliminate the CPT department. Contrary to his established business practice, he consulted with no one. He did not even tell his vice presidents of his decision until a regular staff meeting. Such uncharacteristic actions, coupled with Smith's false report to the affected employees that the decision followed discussion with other management officials, belie any claim that this was a business decision. This decision was directly related to the Union. Respondent had, in the summer, eliminated nine bargaining unit positions by the creation of the assistant supervisor position. Now, at the outset of bargaining, Respondent was eliminating another eight positions, positions held by employees who had voted overwhelmingly for the Union. I find that Smith's unilateral decision to eliminate the CPT department was intended to reemphasize to Respondent's employees that reliance on the Union was futile.

In assessing the evidence under the analytical framework of *Wright Line*, I find that the CPT engineers did engage in union activity, that Respondent was fully aware of their support for the Union, and that Respondent bore animus towards employees who engaged in union activity. I find that the General Counsel has established a prima facie case and carried the burden of proving that union activity was a substantial and motivating factor for Respondent's elimination of the CPT department. Respondent has not established that it would have taken the same action if the engineers had voted to stay out of the unit and not to be represented by the Union.

The complaint alleges two additional violations in conjunction with the elimination of the CPT department, the first being the layoff of the engineers on January 23, 1995. After the distribution of the memorandum of January 16, 1995, Respondent heard unsubstantiated rumors of possible sabotage by the engineers from some technicians. The engineers turned in their keys to assure that there would be no basis for suspecting them. Vice President Kramer informed Smith of the rumors and that the engineers had turned in their keys. There is no evidence that Respondent sought to determine the source of the rumors. Smith directed that the engineers be told not to report to the plant as of January 23. Respondent's attorney informed the Union that the employees would be paid through the end of the month. The continuation of the CPT department employees' salaries obviates the need for an affirmative remedy. Nevertheless, Respondent's willingness to act on an unsubstantiated rumor further confirms its desire to rid itself of these union adherents and, consequently, violated Section 8(a)(3) of the Act.

The final complaint allegation relating to the CPT department concerns the denial of the January 1995 bonus to these employees. To be eligible for a share of the monthly bonus, any employee had to work the entire month. Insofar as I have found that the elimination of the department violated Section 8(a)(3), it follows that, but for that unlawful act, the employees would have continued working and been entitled to the bonus. The remedy that I order will include payment of the January 1995 bonus, as well as any other monthly bonuses to which the CPT department employees would have been entitled.[64]

4. Discharge of Lee Sprecker

a. Facts

Lee Sprecker, an electronic technician, worked for Respondent on three separate occasions, the most recent being from shortly after the election, in May 1994, until he was discharged on January 25, 1996.[65] In late March 1995, Sprecker began publishing a newsletter. The first issue was called The Circuit Breaker, and subsequent issues were called the ACTWU Newsletter. Sprecker is identified as the editor in the first issue and a subsequent issue contains his observations regarding a bargaining session. There is no contention that Respondent was not fully aware of Sprecker's support of the Union.

Through his employment, Sprecker knew Ott Nichols, who now lives in Missouri. Sprecker also knew Ed Scarboro, a current employee who is a computer hobbyist. Sprecker was aware that Scarboro had various schematics, books, and instructional materials relating to computers since he had taught classes after work.

In late 1995, Nichols called Sprecker from Missouri, asking about AC drives. Sprecker replied that he knew nothing about AC drives, that he did not work on drives. Nichols then mentioned Scarboro, saying that he, Scarboro, had some stuff at home about them. He asked Sprecker to get Scarboro's telephone number, and Sprecker agreed to do so. The next time Sprecker saw Scarboro, he asked for his telephone number and Scarboro gave it to him.[66]

Sprecker called Nichols and gave him Scarboro's telephone number. The conversation turned to computer software and Sprecker offered to send a sample of what a particular CD-ROM could do. He offered to send it, along with anything that Scarboro might have.

[63] *La Conexion Familiar & Sprint Corp*., 322 NLRB 774, 775 (1996), the Board considered the hiring of a manager without advising him of the possibility of impending closure, despite the existence of financial problems, to be evidence that the respondent's closure decision was in response to employee union activity, rather than respondent's asserted financial problems.

[64] The General Counsel argues that the CPT department employees were deprived of the bonus due to their untimely layoff on January 23, 1995. My reading of the record reveals that the memorandum of January 16, 1995, informing them of the elimination of the department, set their layoff date as January 30, 1995, 1 day short of the full month. Insofar as it is undisputed that employees must work a full month to be eligible for the bonus, the memorandum of January 16, 1995, assured that no CPT employee would be eligible for the bonus. The setting of the layoff date on January 30, 1995, is additional evidence of Respondent's discriminatory motive. Not only were these employees subjected to the injury of elimination, they also bore the insult of having to work 1 day less than a full month, thereby forfeiting any bonus to which they would otherwise have been entitled.

[65] Sprecker had been a supervisor for about 6 months during one of his prior periods of employment.

[66] Scarboro initially denied giving Sprecker his telephone number, but later acknowledged that he could have.

On December 31, 1995, Nichols called Scarboro, asking if he had any schematics for AC drives. He said he could give him "something'' for them, but not much. He mentioned that Sprecker could pick them up.

In early January 1996, Sprecker received a call from Nichols. Nichols told Sprecker that Scarboro did have something for him. Sprecker again offered to get whatever it was from Scarboro and send it to him.[67] On January 23, 1996, the next time Sprecker saw Scarboro he asked, "Ed, do you have something for Nick?'' Scarboro replied, "No.''[68]

On January 10, 1996, Scarboro had reported the call from Nichols to his supervisor, Mike Miller, saying that Nichols had attempted to purchase schematics for parametric AC drives.

Scarboro reported Sprecker's approaching him to Miller and met with him shortly after midnight, the morning of January 24, 1996, After reporting to work on January 24, at about 11:30, p.m., Scarboro spoke to Kramer. The record is silent as to what transpired in that conversation.

Smith received an oral report of the situation.[69] He ended up thinking that Sprecker had asked a technician to supply company documents to him for use by a former employee who was a competitor. On the basis of the reports he received, and with no further investigation, Smith decided to discharge Sprecker. It is undisputed that Sprecker was not contacted until he was called into the office to be discharged.

On January 25, 1996, when he reported to work, Sprecker was called into a meeting that included Smith, Kramer, Williamson, and employees Gwaltney and Myers. Smith informed Sprecker that he was terminated for violation of his employment agreement; that the matter had already been discussed by management and the decision was made. Sprecker asked what this was all about and Smith told him that he (Sprecker) had asked another technician to obtain parametric drive schematics for a competitor of Electrical South. Sprecker denied that he had stolen anything from the Company. He explained that he understood that this other person was going to bring some papers from his house that he, Sprecker, was going to send to another person. He again denied that he had stolen anything. Smith disputed this, saying that Sprecker had approached another technician and asked him to obtain parametric schematics and later asked if he had anything "for Nick.'' Smith said that if Sprecker would be forthcoming he could possibly avoid future legal action by the Company. Sprecker again stated that all he knew was what he had done, that he did not know about anyone else doing anything. Smith stated that management "had information to the contrary.'' Gwaltney asked what proof the Company had and Smith replied "sufficient proof to take action.'' Myers noted that Smith had stated that if Sprecker had any information he could avoid legal action. Sprecker again denied doing anything wrong. Smith then left the meeting.[70]

The termination form stated that Sprecker was discharged for violating his employment agreement and for attempted theft of company property. The employment agreement prohibits disclosure of confidential information or competition with Electrical South. Confidential information specifically does not include "information which is common to the trade.'' Scarboro confirmed that the schematics about which Nichols inquired were easily available, the most logical source being the manufacturer. I find that they were not confidential information. There is no evidence that Sprecker was engaged in any competing business. Sprecker understood that Nichols was calling Scarboro because he thought that Scarboro, a computer hobbyist, had copies of the schematics at his home.

b. Analysis and concluding findings

The record is clear that Sprecker engaged in union activity, that Respondent was aware that Sprecker was engaging in union activity, and that Respondent bore animus towards union activity by its employees. In evaluating the circumstances surrounding Sprecker's discharge, the issue is whether Respondent seized upon the oral report of Scarboro's report to Miller to rid itself of a union activist or whether it legitimately terminated Sprecker because of violation of his employment agreement.

Respondent argues that Respondent had a "reasonable basis'' upon which to believe that Sprecker was attempting to assist Nichols in stealing company documents. The cases cited in support of this argument are inapposite. In *GHR Energy Corp*., 294 NLRB 1011, 1013–1014 (1989), Respondent acted on the belief in the truthfulness of one employee's identification of two employees who allegedly had been involved in a bottle throwing incident. Unlike the instant case, that respondent did not discharge the employees on the basis of a garbled report that bore no resemblance to the facts. Rather, the company official who discharged the two employees received the statement of the accusing employee and personally interviewed that employee, confirming that the report he made to the investigating supervisor was consistent. He then confronted the offending employees with the accusation. He had not prepared termination papers for them prior to his investigatory interview with them.[71]

[67] Nichols would have had no reason to tell Sprecker that Scarboro had something for him if, as Scarboro testified, he told Nichols that he "did not want to be a part of it.'' In response to one question, Scarboro indicated that he took advantage of the Company's "amnesty program.'' There would be no need for amnesty if, when initially approached by Nichols, he had said that he wanted no part of it.

[68] Scarboro testified that Sprecker first asked whether he "had anything for me?'' Scarboro replied, "[N]o,'' and it was then that Sprecker asked, "[F]or Nick?'' The variance is immaterial.

[69] The record does not identify the source of Smith's information. Smith did not recall whether he reviewed Scarboro's statement; however, it is clear that he did not since the statement clearly notes that Nichols, not Sprecker, asked for schematics. Scarboro did not begin to prepare his statement until the morning of January 25, 1996, and the record does not reflect when it was completed and delivered to Respondent. If Smith had read Scarboro's statement, his incorrect impression of what had occurred would have been corrected.

[70] Williamson prepared a document that purports to be the minutes of the discharge meeting. It reports that Sprecker, in the course of the meeting, acknowledged that he had asked Scarboro for schematics. Both Sprecker and Gwaltney testified that no such statement was made. I find, consistent with the testimony of both Sprecker and Scarboro, that Sprecker did not ask him for schematics and that Sprecker never said that he did. Respondent, in brief, appears to attach some significance to this alleged admission; however, even if such a statement had been made, it played no part in the decision to discharge Sprecker. That decision was made on the erroneous conclusion that Smith had made prior to the meeting.

[71] The second case cited by Respondent, *Lucky Stores*, 269 NLRB 942 (1984), involved a confidential employee with access to confidential labor relations information. It was undisputed that the confidential employee had signed a posting for a unit position. The Board has held that, in cases involving confidential labor relations information, a company is privileged to act when there is a "more than conjectural'' possibility that the employee will divulge that information. *Raytheon Co.*, 279 NLRB 245 (1986). There is no issue of confidential labor relations

Although Smith testified that the purported violation of the employment contract was violation of the covenant not to compete and disclosure of confidential information, he acknowledged that violation of the covenant not to compete "might be a stretch.'' Scarboro admitted that the schematics for which Nichols asked were not confidential information, rather they were easily available from the manufacturer. Smith's belief that Sprecker was trying to steal documents for his own gain was not reasonable. It is contradicted by Scarboro's written statement. There was no evidence of any "gain'' for Sprecker. Scarboro reported that Nichols, when asking for schematics, mentioned he could give Scarboro "something'' for them. There is no evidence of any intent to steal, or assist in stealing, on the part of Sprecker. Sprecker assumed that Scarboro, an employee who knew about AC drives and was a computer hobbyist, would legitimately obtain whatever it was that Nichols wanted.

In light of Respondent's knowledge of Sprecker's union activities and its animus towards employee union activity as established by the numerous unfair labor practices that I have found it committed, General Counsel has established that Sprecker's union activity was a motivating factor in Respondent's decision to discharge him. Under *Wright Line* the burden shifts to Respondent to demonstrate that the same action would have been taken absent union activity by Sprecker.

I find that Respondent has not met this burden. The facts on which Smith relied in making his decision to terminate Sprecker simply were not true. Smith acted upon information that Sprecker had asked a technician supply company documents to him for use by a former employee who was a competitor. Scarboro himself confirms that Sprecker never asked him to do anything. Nichols called him directly. The only action taken by Sprecker, other than to obtain Scarboro's telephone number, was to ask whether he had anything "for Nick.'' The record does not identify the supervisor who provided Smith with the information he acted upon, thus I am unable to determine whether Smith was given erroneous information or did not understand what he was told. Scarboro's statement clearly states that Nichols, not Sprecker, asked for schematics. Smith acted without even reading that statement. There was no meaningful investigation. The employee who was the subject of the investigation was not given an opportunity to explain his actions prior to the discharge decision being made. *K & M Electronics*, 283 NLRB 279, 291 (1987). Smith's precipitous action resulted in a decision to discharge Sprecker on accusations of conduct which both Scarboro and Sprecker confirm never occurred. Respondent did not have a reasonable basis for its action.

Further evidence that Respondent has failed to carry its burden is the absence of evidence that any other employee has been discharged for alleged violation of the covenant not to compete. Indeed, prior to the election, in April 1994, Smith confronted employee Donald Tucker concerning his competition with the Company. In the course of the meeting Tucker acknowledged having actually taken company documents. Smith requested that Tucker return all documents and decide if he wished to quit competing or quit working at Electrical South. Tucker quit competing and kept working.[72]

Respondent did not check the facts on which it relied with the written statement that Scarboro either had prepared, or was preparing. Instead, it precipitously dismissed the editor of the prounion newsletter that was circulated at its facility based upon the scenario of Sprecker requesting schematics from Scarboro, an event that never occurred. There is no evidence of any employee being discharged for alleged violation of the employment agreement, and the record does not establish that Sprecker violated the agreement. Respondent has not established that Sprecker would have been discharged in the absence of his union activity and I find that his termination violated Section 8(a)(3).

E. Postcertification 8(a)(5) Allegations

1. Merit pay increases

a. Facts

Respondent performs both semiannual and annual performance evaluations upon each employee. The annual evaluation, on the employee's anniversary date, determines whether a merit pay increase is given. Data extracted from company records reveals that in 1993 and January 1994, of 32 reported evaluations, all but two employees received raises and the average raise was 73 cents an hour. In the remaining 11 months of 1994 and January 1995, of 85 reported evaluations, all evaluated employees received raises, with the average raise being 83 cents an hour. CEO Smith's initials began appearing on evaluations as of February 1995.[73] In the remaining 11 months of 1995 and January 1996, of 76 reported evaluations, 10 employees received no raise, and raises granted averaged 49 cents an hour. Thereafter in 1996, 38 evaluations had been performed. The raises averaged only 38 cents an hour and nine employees received no raise.

Under Respondents evaluation system, the shift supervisor makes the initial merit raise recommendation then the appropriate vice president reviews the evaluation and raise recommendation. The prime factor evaluated is efficiency, that is, dollar-per-hour productivity. The evaluation also takes into account the type of equipment the employee is working on, whether the employee has been moved recently, or has had to absorb other people's work. Smith gives final approval for every merit raise after considering these same factors. He points out that it is not always "just black and white.'' Consideration is also given to whether the employee is new since the starting rate of $10 an hour has not changed in several years.[74] Smith mentioned that competitive factors are also taken into account, such as whether the Company had a price increase, and noted that the Company's price increases have been relatively small recently. He summarized saying "We try to look at every employee as an

information in the instant case, and the schematics that Nichols was seeking were not confidential in any event.

[72] Counsel argues that, since Tucker had expressed support for the Union prior to the meeting in April, Respondent's treatment of him rebuts a finding animus. I disagree. Although Tucker had privately expressed support for the Union in ongoing conversations with Smith, the election had not been held. It may well be that Smith thought his action in retaining Tucker would dissuade him from supporting the Union. He was not asked about his reasoning. Smith investigated the Tucker situation by speaking with him and asking whether he was competing. Sprecker was not interviewed; he was called into the office and fired.

[73] Smith was not as involved in approving increases in the early 1990's. He was not specific regarding when he again became involved. Mitchell testified that Smith was involved during the 6 months that he was vice president of production in 1994; however, Smith apparently was not initialing the approved raises at that time.

[74] This suggests that higher paid employees would not receive raises as generous as lower paid employees.

individual, and judge them by the parameters we've always used.''[75]

Although the testimony does reflect that the factors evaluated are constant, the record is devoid of any evidence regarding how the amount of recommended raise, relative to the various factors being evaluated, is determined. There is, so far as the record shows, no formula. The amount of the raise, if given, is discretionary. Insofar as data extracted from Respondent's documents reveals that 11 employees did not receive any raise in 1995, Respondent appears to have exercised its discretion differently than it did in 1993 and 1994. The data reflects that the maximum increase given in 1995 and 1996 was 80 cents, suggesting that a cap was established. Some employees who were rated as needing improvement received raises in 1993 and 1994. No employee rated as needing improvement received an increase in 1995 or 1996. Although the testimony does not reflect any changed criteria for merit raises, the data clearly reveals that there was a change in the manner in which Respondent exercised its discretion with regard to the employees in the bargaining unit.

b. Analysis and concluding findings

An employer's obligation, upon employees' selection of a collective-bargaining representative, is to continue in effect the employees' existing terms and conditions of employment until they are altered as a result of good-faith bargaining. An established practice of general wage increases is such a term and condition of employment. An established practice of discretionary merit increases is also such a term and condition of employment. *Daily News of Los Angeles*, 315 NLRB 1236 (1994). When dealing with discretionary merit increases, however, an employer has an additional obligation: it must consult with the employees' bargaining representative regarding implementation of the program to the extent that discretion exists in determining the amounts of the increases. Id. at 1239; *Oneita Knitting Mills*, 205 NLRB 500 (1973). Respondent did not do so and, by failing to do so, it violated Section 8(a)(5) of the Act.

2. Health insurance

a. Facts

On March 22, 1995, Respondent's negotiator, attorney Todd Cline, telephoned the Union's negotiator, Harris Raynor, advising that Respondent was faced with a crisis regarding insurance coverage. Existing coverage would lapse on April 30, 1995, and the carrier, Principal, would increase premiums 70 percent to continue coverage at the existing level. A letter dated March 23, 1995, confirming the problem was sent to Raynor. Raynor responded by letter dated March 27, 1995, with a request for various items of information and by a letter dated March 31, 1995, seeking clarification and additional information as well a request that Respondent consider insurance through Amalgamated Life Insurance Company (ALICO).[76] Cline responded by letter dated April 6, 1995, enclosing the information and stating there was no objection to ALICO preparing a cost estimate.

In the letter of March 23, 1995, Cline had proposed the following changes in the existing program: (1) eliminating the prescription drug card; (2) eliminating mail-order prescriptions; (3) eliminating supplemental accident coverage; (4) increasing the deductible from $200 to $600 a year; and (5) requiring employee payment of 50 percent of individual coverage.

The first bargaining session regarding insurance was on April 10, 1995. The parties agreed to bargain insurance separately from the overall contract. Respondent introduced Brian Sowers, an insurance broker. The parties discussed Respondent's past insurance experience and various options, including changing carriers. The Union interposed no objection to this, noting that the concern was coverage, not the identity of the carrier. Sowers stated he was attempting to obtain bids from 13 companies. Raynor pointed out that if, as Respondent had proposed, employees paid 50 percent of individual coverage the Company would be better off than under the current plan. Respondent dropped that demand from its proposal. Raynor requested that ALICO be included, indicating that he would have someone from the Union contact Sowers. Raynor emphasized the Union's desire that coverage include a prescription drug card and payment of some dependent coverage by the Company.

In late April, Cline telephoned Raynor and advised that coverage would not lapse, that an extension, albeit at the higher rates, had been granted.[77] Sowers had not yet received the information he was gathering. The next bargaining session was set for May 22, 1995. On May 2, 1995, Raynor sent Cline a letter requesting additional information.

On May 22, 1995, the parties met again. Discussion centered on the coverage provided by a company named Protective Life, the company that provided coverage to Respondent's nonbargaining unit employees. Protective did not offer a drug card or mail-order prescription benefit. Cline proposed this coverage. In the course of discussion the $600 deductible demanded in Cline's March 23 letter was reduced to $500. Raynor stated that there was no objection to switching from Principal to Protective, although this would result in the loss of supplemental accident coverage.[78] Raynor requested the effect of adding a drug card and reduction in the deductible to $200 or $300.[79] Cline stated that he was concerned that at some point the Union needed to accept the Company's proposal or make a legitimate counterproposal. He asked whether ALICO had made a proposal and Raynor responded that the cost was comparable to the increased premiums that Principal had imposed.

On May 26, 1995, the parties met again. The information regarding the increased cost of a drug card and lower deductible were provided in percentage terms and someone performed the calculations so that firm figures were stated for the premium.[80] Raynor prepared a chart showing the figures. Respondent proposed Protective's basic coverage, no drug card, and a $500

[75] I heard Smith say "parameters'' and have corrected the transcript from "perimeters.''

[76] ALICO is a multiemployer trust with both company and union trustees.

[77] At some point Cline explained to Raynor that Principal's extension was "indefinite, but not infinite.'' Raynor did not advise Cline, due to the continuation of insurance, that the Union's position had changed and that it was no longer willing to negotiate insurance separately.

[78] Under Principal, the first $500 for treatment for accidents was covered; the 20-percent copayment was waived.

[79] Raynor noted in his testimony that prescription drugs were covered under the major medical portion of the plan, but this required a 20-percent copayment and the inconvenience of having to file a claim.

[80] Raynor, both in negotiations and in his testimony, expressed his consternation with being given a percentage figure rather than a firm monetary amount. He acknowledged that Cline found this unusual and made an effort to obtain the information in firm figures, but was unsuccessful. Cline then invited Raynor to contact Sowers, the insurance broker, directly.

deductible, which would cost $104.60 per month for individual coverage. This was approximately $40 less than continued coverage by Principal. Adding a drug card with no cap on the cost of prescriptions to the Protective basic coverage and dropping the deductible to $200 resulted in a cost of $123.11 per month. Raynor proposed these additions. Cline rejected these requests, as well as a request that the Company pay one half of the dependent coverage. Cline proposed implementation of the Protective plan on July 1, 1995. He stated that if the Union were to agree to that, the Company would refund the difference in premiums for dependent coverage that employees had been paying since the increase in Principal's rates on May 1. Raynor stated that he would take the offer to the membership, but would not recommend it.

On June 19, 1995, the parties bargained about various matters before returning to insurance. The Union again requested a medical card and payment of one half of dependent coverage. Cline rejected the demand. Raynor reported that the employees had rejected the Company's proposal. Cline asked if the parties were at impasse, indicating that the Company would implement its proposal on July 1, 1995. Raynor responded that insurance could be dealt with as part of the whole economic package. Cline stated that he felt the parties were at impasse and that Raynor was trying to change the rules since he had agreed to bargain insurance separately.

The parties wrote each other following this meeting, but the letters crossed in the mail. On June 22, 1995, Cline wrote Raynor, summarizing the bargaining as he saw it and stating that the parties were at impasse. On June 21, 1995, Raynor wrote Cline requesting additional information and stating that the parties were not at impasse. Raynor's letter requests various pieces of information including the following:

1. A statement directly from Protective explaining why they quote "modifications'' (drug card and lower deductibles) in percentage terms.

2. The correct amount of the cost for individual and family coverage under Principal, prior to the premium increase, noting that Smith had posted figures on the bulletin board on April 24 that were higher than the $93.07 and $195.52 figures that Cline had given the Union.

3. Figures from Protective breaking out the cost of prescription drug coverage, which is partially covered under major medical, and then detailing the dollar difference to cover the cost of drug coverage, with a medical card with a $5/$10 deductible and, alternatively, a $10/$15 deductible.

Respondent implemented its health insurance proposal on July 1, 1995, changing to Protective. The parties met for bargaining on July 21, 1995. When Raynor sought to raise the issue of insurance, Cline advised that it was settled, that the Company had no obligation to bargain further regarding insurance.

b. Analysis and concluding findings

In determining whether impasse has occurred, the Board considers various factors, including the good faith of the parties in the negotiations, the length of the negotiations, the importance of the issue, and the contemporaneous understanding of the parties.[81] In this case, there is no allegation of bad-faith bargaining. Respondent made several concessions from its original proposal, and, as a result, the Respondent is now paying approximately $11.50 more per month, per employee, for individual insurance coverage.[82] Respondent stated that it would consider any proposal the Union wished to make, and the Union contacted a jointly trusteed fund, ALICO, in order to obtain a bid. ALICO was unable to make a competitive bid, and this was reported at negotiations. The Union never presented a comprehensive counterproposal. Rather, it sought to maintain the level of coverage that Principal provided, as well as seeking a concession regarding a company contribution towards dependent coverage. It is unclear when Respondent dropped the deductible from $600 to $500, but this occurred no later than the May 22, 1995 meeting. The parties' positions did not change after that meeting. At the May 26 meeting Raynor indicated that, although he would not recommend it, he would take the company proposal to the membership. On June 19, 1995, he reported that the employees had rejected the proposal. He continued to seek the same concessions he had sought on May 26, and Respondent refused to make the requested concessions. I find that the parties were at impasse. *Litton Systems*, 300 NLRB 324, 332 (1990).

In making this finding, I am mindful of the Union's concern regarding the manner in which Protective quoted rates, as percentages rather than firm figures. Despite this, the parties did compute the projected increase in costs that would occur if the Company's proposal were modified by adding a drug card and reducing the deductible. This was done at the meeting of May 26, 1995. Respondent rejected the request. Cline told Raynor that he had no objection to his directly contacting insurance broker Sowers regarding the manner in which Protective quoted rates, but it does not appear that Raynor did so. The Union requested no additional information during, or immediately after, that meeting. The additional information request was not made until June 21, 1995, after the June 19 meeting in which Cline suggested the parties were at impasse.

General Counsel argues that the parties were not at impasse because of the unanswered information request. I find that the information request did not alter the fact that the parties were at impasse.

When the parties returned to the bargaining table on July 21, 1995, the insurance proposal had been implemented. The parties had agreed to first discuss contract language and then turn to economic issues. The Union had agreed, under the threat of lapsed coverage and significantly increased rates, to bargain insurance separately. That bargaining having concluded, there was no obligation on the part of Respondent to address an economic item at that time. By refusing to address the issue of insurance on July 21, 1995, Respondent did not violate the Act.

The Charging Party argues that, upon relaxation of the May 1, 1995, deadline, the ground rules changed and insurance simply became another economic item in the contract. Citing *Bottom Line Enterprises*,[83] it argues that Respondent was not privileged to implement the new insurance program even assuming impasse.[84] This argument would be appealing if, when advised

[81] *Taft Broadcasting Co*., 163 NLRB 475 (1967).

[82] Principal's premium for individual coverage was $93.07. Respondent now pays $104.60.

[83] 302 NLRB 373 (1991).

[84] *RBE Electronics of S.D.,* 320 NLRB 80 (1995), the Board recognized an exception to *Bottom Line* in situations where "an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely.'' Id. at 82. I need not find whether the threatened lapse in coverage was such an economic exigency since the Union agreed to bargain. After the

that there would be no lapse in coverage, Raynor had expressed unwillingness to bargain insurance separately. I have found that the parties initially agreed to bargain insurance separately. When the Union continued to bargain, without asserting that the rules had changed since there was going to be no lapse in coverage, Respondent justifiably assumed that the parties were bargaining insurance separately, as they had begun to do on April 10, 1995, when faced with lapsed coverage. Cline could not read Raynor's mind. Thus, he was justified in accusing Raynor of changing the rules when, on June 19, 1995, Raynor indicated that he wanted to deal with insurance as part of the whole economic package, not separately. Since the parties had continued to bargain the insurance issue separately, I find that Respondent was privileged, on impasse, to implement its proposal.

Regarding the information request, an employer must provide information that is necessary for, and relevant to, the Union's performance of its bargaining obligation. An employer is not required to provide information that it does not have. The parties had discussed at length the difficulty inherent in dealing with Protective's quotation in percentages. Cline had concurred with Raynor that this was unusual and that he had been unsuccessful in seeking to find out the reason for this. He had urged Raynor to contact Sowers in this regard, but Raynor had not done so. Notwithstanding the inconvenience, the parties had computed the figures on May 26, 1995. The Union had made its demand for this increased coverage, and Respondent had rejected it. As of June 21, 1995, there was no need for an explanation from Protective as to of why it quoted in percentage terms. Thus, there is no basis for finding a violation based on Respondent's failure to respond to this request. Regarding the apparent different figures for costs of the prior Principal coverage, Raynor had, at the bargaining session on May 26, 1995, written the figures with which the parties were dealing on a flip chart. If there was any question regarding the validity of those figures, it is not reflected in either Raynor's testimony or the minutes of the meeting. Thus, from a bargaining standpoint, the figures that Smith had allegedly posted in April were, at best, of historical interest. They had no current relevance, and Respondent had no obligation to respond to this request. As reflected above, the parties had bargained to impasse on insurance. The Union had, from the outset, unsuccessfully sought to retain a prescription drug card under the program. The information sought in the request of June 21 was not relevant to the insurance program implemented. Nevertheless, it was relevant with regard to the formulation of future proposals. Thus, I find that by failing to respond to the Union's request that Respondent seek to have Protective determine the cost of prescriptions under its major medical coverage and provide a breakdown of premiums for a drug card with deductibles of $5/$10 and $10/$15, Respondent violated the Act.

In summary, I find that the record establishes that the parties were at impasse. The 11th hour information request did not change this. As found above, Respondent has violated the Act by failing to respond to the Union's request that it have the insurance carrier provide the information relating to comparative costs if prescriptions were dropped from the major medical portion of coverage and a medical card with deductibles substituted therefor. Respondent did not unlawfully fail to bargain regarding insurance in July 1995 since the parties had not yet turned to economic issues.

threatened lapse was postponed, the Union continued to bargain about insurance and did not, until June 19, argue that implementation should await a total contract.

CONCLUSIONS OF LAW

1. By advising employees that company policies will be more strictly enforced because of their union activities, advising employees that selection of the Union as their collective-bargaining representative was futile, creating the impression that employees' union activities were under surveillance, interrogating employees concerning their union sympathies, activities, and desires, advising employees that the wearing of union insignia is inappropriate, threatening unspecified reprisals and plant and department closure because of employees' union activities, and prohibiting discussion about the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing a verbal warning to Doug Gwaltney, issuing written warnings to David Albertson and Charles Trotter, discharging Lee Sprecker, and eliminating the CPT department, because of their support for, and activities on behalf of, the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By unilaterally, without notice to or bargaining with the Union, instituting scheduled instead of flexible breaks, creating an assistant supervisory position that included the continued performance of bargaining unit work, establishing a disciplinary procedure for violation of its tobacco policy, establishing a written parking policy, establishing a written policy for bidding on job vacancies, dealing directly with employees regarding the scheduling and length of breaks, unilaterally determining the amount of employee merit increases, and failing and refusing to provide relevant information relating to the cost of drug coverage under its health insurance, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In regard to the Section 8(a)(3) violations, the Respondent, in order to restore the status quo ante, will be ordered to reestablish the CPT department. In this regard I note that all necessary equipment is present and the functions formerly performed by the CPT engineers are being performed by the more experienced technicians or subcontracted through outsourcing. *Lear Sieglar, Inc.*, 295 NLRB 857 (1989). Respondent will be ordered to remove all references to the unlawful discipline, including the discharge of Lee Sprecker. The Respondent, having discriminatory discharged and laid off employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Backpay will specifically include their pro rata share of all monthly bonuses paid in January 1995 and thereafter and any wage increases they would have received.

In regard to the Section 8(a)(5) violations, the Respondent will be ordered, on the request of the Union, to rescind any or all policies and practices that were implemented in 1994, and to bargain in good faith before making changes in employees' wages, hours, and working conditions. Respondent will be ordered to request that its insurance carrier provide the drug cost information requested by the Union. The discretionary merit increases, the amounts of which were unilaterally determined and granted to unit employees, significantly decreased beginning in February 1995. The Charging Party, noting that Smith began initialing wage increases at that time, has requested a remedy that effectively continues the raises at the average from prior years; however, I found that Smith was involved in reviewing merit raises at least as early as the spring of 1994 when Mitchell was vice president of production. The failure to bargain over discretionary merit increases is a Section 8(a)(5) violation, and I am, therefore, not inclined to order a monetary remedy of a specific amount. See *Florida Steel Corp*., 220 NLRB 260 (1975). A retroactive bargaining order would not assure agreement. Nevertheless, the record clearly reflects a significant decrease in the increases granted in 1995 and 1996. I shall, therefore, consistent with the Board's decision in *Daily News of Los Angeles*, 315 NLRB at 1241, supra, in which the respondent actually discontinued merit increases, order that the employees herein be paid the difference between their actual wages and the wages they would have otherwise received. In order to assure that Respondent exercised its discretion even-handedly towards bargaining unit employees, the merit increases granted to the Respondent's unrepresented employees, as identified in the unit description, should be instructive.

[Recommended Order omitted from publication.]